No. 83-6213

filed Feb. 3, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONNIE RAY EVANS,

Petitioner,

-v-

THE STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

ISAAC BYRD
Owens & Byrd
P.O. Box 19
Jackson, Mississippi 39205
(601) 352-8443

SHIRLEY PAYNE
P.O. Box 1725
Jackson, Mississippi 39215
(615) 352-7059

STEVEN L. WINTER*
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

ATTORNEYS FOR PETITIONER

*Counsel of Record

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QUESTIONS PRESENTED

1. May Mississippi's recent extension of its procedural default rule to death cases serve as an independent and adequate state ground barring review of fundamental federal constitutional questions when:

a) The extension is applied retroactively and irregularly, in the teeth of more than fifty years of state law; and

b) The extension was adopted for the purpose of evading federal habeas corpus review of asserted federal claims?

2. Should the death sentence imposed on petitioner, who is Black, be set aside because it is a product of a capital sentencing scheme that discriminates on the basis of race in violation of the eighth and fourteenth amendments?

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Petitioner, CONNIE RAY EVANS, prays that a writ of certiorari issue to review the decision of the Supreme Court of Mississippi on November 30, 1983, denying leave to file a petition for a writ of error coram nobis challenging his death sentence.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 441 So.2d 520 (Miss. 1983). It is set out in the Appendix at pp. A. 1 - A.15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Mississippi was entered on November 30, 1983. A timely request for rehearing was filed on December 11, 1983, and was denied on January 25, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the eighth amendment to the Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

It also involves §§ 99-19-101 and 99-19-105, Miss. Code Ann. (Supp. 1982), which are set out in the appendix at pages A. 20 - A. 22, and Rule 6(b) of the Rules of the Supreme Court of Mississippi, which provides in relevant part:

> No error not distinctly assigned shall be argued by counsel except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner and another person were charged with the robbery and murder of Arun Pahwa, an Indian national who worked as an attendant in his brother's store. On October 12, 1981, petitioner pled guilty to capital murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi. He was sentenced to death on October 13, 1981.

On November 3, 1982, the Supreme Court of Mississippi affirmed the conviction and sentence. Evans v. State, 422 So.2d 737 (Miss. 1982); A. 69. Rehearing was denied on December 15, 1982. This Court denied certiorari on May 16, 1983. Evans v.

Mississippi, ____ U.S. ____, 77 L.Ed.2d 314 (1983), and thereafter denied rehearing.

A motion for leave to file a petition for a writ of error coram nobis, together with the petition, was filed in the Mississippi Supreme Court on July 1, 1983. The petition raised numerous errors under state law and the federal Constitution that, petitioner alleged, vitiated his sentence of death. On November 30, 1983, the Mississippi Supreme Court rendered an opinion denying all of petitioner's claims on procedural grounds. It held that those claims which had been raised on direct appeal were res judicata and that those which had not were barred by principles of procedural default. Evans v. State, A. 3 - A. 4. None of petitioner's federal or state law claims were addressed on the merits.

Justice Robertson, joined by Justices Hawkins and Prather, dissented. The dissent noted that the majority decision "renders the writ of error coram nobis an empty form of action." A. 5. It recounted the history of the writ in Mississippi, A. 5 - A. 7, pointing out that prior Mississippi cases had entertained and granted relief in coram nobis cases presenting issues not raised on direct appeal. A. 6 - A. 7 (citing Fondren v. State, 199 So.2d 625 (Miss. 1967)). The dissent lays bare the underlying purpose of the newly extended Mississippi procedural default rule:

> It is important to understand the reasons why the State urges that the issues tendered be disposed of on procedural grounds only. The State's articulated motivation is to short-circuit anticipated federal court review via habeas corpus under 28 U.S.C. § 2254. The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case. The State not only asks that we refuse to address Evans' claims

> on their merits but unashamedly further seeks our aid in avoiding litigation of Evans' ... federal constitutional claims in any federal court.

A. 12 (footnote omitted; emphasis in original). 1/

Petitioner filed a timely motion for rehearing. He asked the Mississippi court inter alia to reconsider whether it should invoke new procedural bars in cases involving fundamental, substantive federal constitutional rights. The motion for rehearing was denied on January 25, 1984. A. 18.

B. Facts Supporting Petitioner's Claims

(1) Petitioner's Challenge to Mississippi's Newly Extended and Retroactively Applied Procedural Default Rule:

The facts supporting this claim are found in the decisions and records of cases before the Mississippi Supreme Court. In petitioner's case, that court invoked a rule that the failure to raise an issue on direct appeal constitutes a waiver, barring review of the issue on coram nobis. A. 3. In doing so, it relied upon a trio of 1983 cases that first articulated such a rule as one to be applied uniformly in all death penalty cases. A. 3 (citing Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1983)).

But until last year, this has never been the law of Mississippi. While Mississippi did apply a procedural default rule in routine criminal appeals -- see Rule 6(b) of

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1/ In the omitted footnote, Justice Robertson noted the anomalous result of the decisions in Wainwright v. Sykes, 433 U.S. 72 (1977), and Engle v. Isaac, 456 U.S. 107 (1982): a state defendant either gets two bites at the apple or none at all. He noted the result in death cases: that "the defendant will be dispatched to the gas chamber without anyone ever having considered on the merits his federal constitutional claim." A. 12 n. 13.

the Rules of the Supreme Court of Mississippi; Thomas v. State, 358 So.2d 1311 (Miss. 1978); Coburn v. State, 250 Miss. 684, 168 So.2d 123 (1964) -- it was not applied in death penalty cases. For at least fifty-seven years, Mississippi has employed a heightened degree of scrutiny in death penalty cases, expressly rejecting the usual procedural default rules. Thus, in Fisher v. State, 145 Miss. 116, 110 So. 361 (1926), the Mississippi Supreme Court reversed a conviction and death sentence based on an illegally obtained confession despite the absence of a contemporaneous objection. It did so because "constitutional rights of a person on trial for his life rise above mere rules of procedure." Id., 145 Miss. at 116, 110 So. at 365.

Fisher was not an "occasional act of grace" by a court that ordinarily applies state procedural default rules. See Bass v. Estelle, 705 F.2d 121, 122 (5th Cir. 1983) (on rehearing). To the contrary, it was the progenitor of a doctrine that was uniformly applied in death cases until last year. Since Fisher, the Mississippi court has consistently reviewed in death cases alleged errors that were not the subject of a contemporaneous objection in the trial court. See, e.g., Carter v. State, 198 Miss. 523, 528, 21 So.2d 404 (1945); Musselwhite v. State , 212 Miss. 526, 59, 54 So.2d 911, 914-15 (1951); Culberson v. State, 379 So.2d 499, 506 (Miss. 1980); Smith v. State, 419 So.2d 563, 568 (Miss. 1982); Wheat v. State, 420 So.2d 229, 239 (Miss. 1982).[2/]

2/ In Wheat, appellant raised five assignments of error. Id., 420 So.2d at 232. The court noted that assigment number 3, concerning instructions not given, had not been preserved below. But it also found no error on the merits. Id. at 239. Then, after examining appellant's five assignments, the court discussed whether the instructions that were given were adequate. Id. at 240-41. The court stressed no less than three times that it carefully "considered," "reviewed," and "stud[ied] the entire record...." Id. at 240-41.

More importantly, the Mississippi Supreme Court has applied this principle not only to review alleged errors that were not properly preserved below, but also to search the record for errors not raised on direct appeal and to decide them on the merits. In Gipson v. State, 203 Miss. 434, 35 So.2d 327 (1948), for example, appellate counsel assigned no errors and filed no brief. The court nevertheless adjudicated the appeal: "Consistent with the policy which this court has imposed upon itself in death cases, we have not dismissed the appeal but have in the interest of justice examined the record, lest by some chance and patent error, the extreme penalty may be unjustly exacted." Id., 203 Miss. at 437, 35 So.2d at 328. Accord Augustine v. State, 29 So.2d 454 (Miss. 1947) ("We have searched the record in vain for some ground on which to reverse the conviction."); Shaffer v. State, 46 So.2d 545 (Miss. 1950); Russell v. State, 226 Miss. 885, 85 So.2d 585 (1956); Drake v. State, 228 Miss. 589, 89 So.2d 593 (1956). Even where counsel has filed a brief and raised some issues, Mississippi has eschewed the rule requiring that all issues be raised on direct appeal and has not applied normal procedural default rules to cases involving the death sentence. Rather, it has applied a standard of review in death cases that led it "in search of errors not assigned ...," Reddix v. State, 381 So.2d 999, 1013 (Miss.), cert. denied, 499 U.S. 986 (1980), "without necessary regard to whether technical basis for preserving error was made by counsel." Irving v. State, 361 So.2d 1360, 1363 (Miss. 1978), cert. denied, 441 U.S. 913 (1979). This standard has been applied not as a matter of judicial grace, but as part of "the requirements for appeal and review by this

Court of all capital murder convictions...." Voyles v. State, 362 So.2d 1236, 1237 (Miss. 1979) (emphasis added); see § 99-19-105, Miss. Code Ann. (Supp. 1982). Accord Laney v. State, 421 So.2d 1216, 1217 (Miss. 1978); Wheat, 420 So.2d at 240-41 (see n. 2, supra); Smith, 419 So.2d at 574; Washington v. State, 361 So.2d 61, 66 (Miss. 1978); Bell v. State, 360 So.2d 1206, 1215 (Miss. 1978); Irving v. State, 228 So.2d 266, 268 (Miss. 1968).

The clearest illustration of the principle that procedural defaults in failing to assign errors on direct appeal in death cases do not operate as a waiver is in the opinions of the Mississippi Supreme Court in coram nobis proceedings. In Bell v. State, 360 So.2d 1206 (Miss. 1978), the death sentenced appellant raised only three issues on appeal. "Although not argued as error on appeal," the Mississippi Supreme Court "raised [four other matters] and discussed them of its own motion." Id., 360 So.2d at 1215. In his petition for a writ of error coram nobis, Bell challenged his conviction and sentence on twenty-three grounds of error. Of these twenty-three, two had been raised by Bell on direct appeal, four had been raised by the court on direct appeal, and seventeen were presented to the Mississippi court for the first time. The Mississippi Supreme Court "carefully and meticulously considered each allegation" on the merits. Bell v. Watkins, 381 So.2d 118, 199 (Miss. 1980). Similarly, the death sentenced appellant in Jordan v. State, 365 So.2d 1198 (Miss. 1978), raised ten issues on direct appeal. The Mississippi Supreme Court affirmed, noting that: "No reversible error has been pointed out by counsel, or revealed by our painstaking scrutiny of the entire record." Id., 365 So.2d at 1207. On coram nobis, Jordan raised three new claims. The

Mississippi Supreme Court rejected them on the merits without regard to the fact that they had not been raised on direct appeal. In re Jordan, 390 So.2d 584 (Miss. 1980).

The rule that failure to raise an issue on direct appeal in a death case does not constitute a waiver -- manifested by the "painstaking scrutiny" afforded on direct appeal and its concommitant, the refusal to view waiver as barring collateral attack on coram nobis, -- was consistently applied both at the time of petitioner's sentencing trial in 1981 and at the time of his direct appeal in 1982. See, e.g., Smith, 419 So.2d at 568, 574; Wheat, 420 So.2d at 240-41. Then, in Edwards v. Thigpen in 1983, the Mississippi Supreme Court reversed course. Id., 433 So.2d at 907-09.[3/] Justice Robertson's dissent below bares the motivation for this abrupt change, A. 12; the record of the proceedings in Edwards provides ample corroboration.

In his Response to Application for Leave to File a Petition for Writ of Error Coram Nobis and/or Writ of Habeas Corpus in Edwards, set out in the Appendix to this petition, the Mississippi Attorney General exhorted the Mississippi Supreme Court that: "The time has come in light of certain events which have transpired within recent history for this Court to review its charted course in capital cases and to reconsider certain concepts...." A. 24. The Attorney General first reviewed federal habeas corpus law regarding 28 U.S.C. § 2254(d), A. 25- A. 29, exhaustion of state remedies, A. 29 - A. 33, and procedural default. A. 35

3/ Although Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983), was reported first, it was decided after Edwards; in fact, it cited and relied on Edwards. Wheat, 431 So.2d at 487.

- A. 43. Then, in a section entitled "Are We Going To Stay the Charted Course or Are We Going to Crash Upon the Rocky Shores of the Federal Judiciary," A. 43, the Attorney General pointed out that in five of the first six Mississippi death cases to reach federal habeas corpus, the writ was granted on the basis of issues that had been raised for the first time on coram nobis. A. 46. He urged the court to recognize that "the power to halt this trend and recoup control ... waits but to be firmly seized." Id. Arguing that: "Should this Court continue to enforce the 'no holds barred' concept embodied in the Irving - Culberson - Laney line of cases ... it will ultimately abdicate its position as the Supreme Court of the State of Mississippi and vest that authority in the United States Court of Appeals for the Fifth Circuit...," A. 46 - A. 47, the Attorney General told the court that: "It is time to fish or cut bait." A. 48. "[T]he suggested course of action? Stripped of all rhetoric, the State simply urges this Court to issue a strong statement to the federal judiciary that it will enforce its own rules of procedure and strictly adhere to them." Id.

The Mississippi Supreme Court responded with an opinion that rigidly invoked procedural bars on every issue. The same approach was taken in Wheat v. Thigpen, 431 So.2d at 488-89, and Smith v. State, 434 So.2d at 215, when these cases came up on coram nobis, despite the fact that prior non-waiver rules had been applied in both cases when on direct appeal. See Wheat, 420 So.2d at 240-41; Smith, 419 So.2d at 568, 574.

In the latter two cases, the Mississippi Supreme Court also illustrated the Catch-22 nature of

its newly extended procedural bars. In both Smith and Wheat, the Mississippi court went through its litany of procedural bars: res judicata for those issues raised on direct appeal, procedural default for those not raised. But, on the issue of effective assistance of counsel, which was first raised on coram nobis, the court performed an intellectual somersault. It held that issue procedurally barred not because petitioners had failed to raise it on direct appeal but because -- having applied the requirement of total review noted in Voyles -- it had purportedly decided that issue on appeal despite the fact the the issue was neither assigned as error nor briefed on appeal. Smith, 434 So.2d at 219;[4/] Wheat, 431 So.2d at 488-89. The court took this tack in spite of its own holding in Read v. State, 430 So.2d 832 (Miss. 1983), that the defendant could at his election raise a claim of ineffective assistance of counsel either on direct appeal or on coram nobis. Id. at 836.

Thus, when petitioner Evans filed his request for coram nobis relief below, the Attorney General could and did cite Smith, Wheat, Edwards, and Hill v. State, 432 So.2d 427 (Miss. 1983) (direct appeal in death case), for the

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4/ In Smith, the court performed the same feat with regard to a challenge to the instructions at the penalty phase. Id., 434 So.2d at 217.

The court also went out of its way to construct a "stipulation" that the ineffectiveness claim could be determined on the basis of the original trial record as a predicate to its "res judicata" ruling. 434 So.2d at 219. There was no such stipulation, as is demonstrated by the court's own opinion. The petition alleged that Smith's lawyer had failed adequately to investigate or prepare the case, id., matters that necessarily cannot be determined from the original trial record. Moreover, although it does not appear from the court's opinion, Smith had explicitly requested an evidentiary hearing on the ineffectiveness claim, thus demonstrating that he made no "stipulation" that the claim could be determined on the face of the original trial record.

proposition that "[r]ecent application of this [procedural default] rule bears out its sustained persuasion whether the case involves non-capital adjudications or the penalty of death." Response to Application for Leave to File a Petition for Writ of Error Coram Nobis at 9 (August 11, 1983) (emphasis added). In urging that the court hold all of Mr. Evans's claims procedurally barred, the Attorney General did not specify any state interest as supporting the bar, but did advise the court that it should be careful and explicit in its invocation of procedural bars because the "small phrases 'procedurally barred' or 'on the merits' utterly control the form and extent of the review which will ultimately follow a state court ruling." Id. at 12.

Yet, the Mississippi Supreme Court's latest decisions evidence inconsistency regarding the application of procedural default rules in death cases. In Pruett v. Thigpen, No. 54,000 (January 11, 1984), the court applied the Edwards - Wheat - Smith trilogy to hold all issues not raised on direct appeal procedurally barred in coram nobis. But when the appellant in Caldwell v. State, No. 54,285 (November 26, 1983), raised an issue that had not been assigned as error on appeal as required by Rule 6 of the Rules of the Mississippi Supreme Court,[5/] Justice Broom's prevailing opinion[6/] first noted the procedural lapse,

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5/ It had been the subject of a contemporaneous objection in the trial court.

6/ In fact, there was no majority in Caldwell; the court split 4-4, one judge having recused himself. As a result, the equally divided court affirmed the imposition of the death penalty. Justice Broom's opinion was for the four who voted to affirm.

The issue in dispute in Caldwell is the same issue that won a reversal of the death sentence in Wiley (but not the issue in Wiley whose procedural posture is discussed below). A motion for rehearing in Caldwell was denied on February 1, 1984. A. 19.

Slip op. at 12, and then nevertheless clearly discussed and decided the issue on the merits. Id. at 12-14.

Similarly, in Hill v. State, the court refused to consider on direct appeal an issue that was not the subject of a contemporaneous objection at trial. Based on the record, it presumed that the failure to object was a tactical choice. Id., 432 So.2d at 439-40. But in Wiley v. State, No. 54,642 (January 4, 1984), the court dealt with an issue in the same posture in quite a different way. Although it noted that the issue was not properly preserved below, relying on the coram nobis opinion in Smith, it nevertheless discussed the merits in both the paragraph preceding the waiver discussion and the sentence immediately following it. Slip op. at 4.

(2) Petitioner's Challenge to the Mississippi Capital Sentencing Scheme as Arbitrary and Discriminatory:

Petitioner's coram nobis petition raised the federal constitutional claims that his death sentence should be invalidated because Mississippi's capital sentencing scheme was being applied in an arbitrary and discriminatory manner. The Attorney General's primary response was that both claims were devoid of factual support. Response to Application at 40-42.[7/] As a secondary ground for disposing of the claims, the Attorney General argued that the arbitrariness issue had been resolved on direct appeal and was res judicata, id. at 41, and that the racial discrimination issue was

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7/ On the question of racial discrimination, he asserted that the Mississippi death row was, at that time, evenly divided with 17 blacks and 17 whites. He also noted that two of the blacks were sentenced to death for killing blacks; that two whites were sentenced for killing a black; and that a white woman was sentenced for killing a white male. Id. at 42.

barred because not raised on direct appeal. Id. at 42 n. 8. The Mississippi Supreme Court rejected both claims on the ground that they were barred because not raised on direct appeal. A. 4; but compare Evans v. State, 422 So.2d at 747; A. 79 (on direct appeal, death sentence held "not excessive or disproportionate ... and even-handed").

The effect of the Mississippi Supreme Court's decision is, of course, to deny petitioner an evidentiary hearing on this issue. This is of critical importance because the issue requires further factual development. Recently available data suggest that race plays a significant part in capital sentencing in Mississippi. Published reports indicate that there is a statistically significant disparity in rates of capital sentencing in Mississippi based on the race of the victim.[8/] Of the 847 reported homicides in Mississippi over a five year period, death sentences were meted out in 8.2% of the white victim cases but only .08% of the more numerous black victim cases.[9/] Indeed, although the black victim homicides outnumber the white victim cases by a margin of 3 to 1, the white victim death sentences

8/ "Courts Study Link Between Victim's Race and Imposition of Death Penalty," New York Times p. A18, col. 1 (January 5, 1984). The article reports a recent study by Samuel Gross and Robert Mauro that studied 17,000 homicides in eight states (including Mississippi) between January 1, 1976, and December 31, 1980. The data referred to in the petition were obtained from this study.

9/ During this period, there were 639 black victim homicides and only 208 white victim homicides.

Although the data do not include the homicide in this case, which involved a victim from India, the basic issue is the same. While Mississippi originally segregated its orientals, this practice changed by the early fifties: "Originally classed with blacks, they are now viewed as essentially 'white.'" J.W. Loewen, The Mississippi Chinese: Between Black and White 2 (Harv. Univ. Press 1971); see id., at 93 (Chinese integrated into white schools); R.S. Quan, Lotus Among the Magnolias: The Mississippi Chinese 124, 139 (Univ. Press of Miss. 1982)(housing and school integration).

outnumber those imposed in black victim cases by 3.4 to 1. This disproportion increases when the race of the suspect is also considered: 25% of the blacks who killed whites received the death sentence as compared to only 4.2% of the many more whites who killed other whites.[10/] Controlling for homicides during the commission of a felony, the report indicates that 32.5% of the felony, white victim homicide cases resulted in death sentences while only 9.5% of the felony, black victim homicide cases did.[11/]

10/ There were 167 white on white killings, accounting for 7 death sentences, and only 40 black on white killings, which resulted in 10.

11/ The Attorney General's factual assertions below (see note 7 supra) do no more than create an issue that requires evidentiary hearing for its resolution. Petitioner does not know the source of the Attorney General's reported 17/17 black/white breakdown of death row at one point in time. According to all available figures, blacks have always outnumbered whites on Mississippi's death row. At the time of the decision in Furman v. Georgia, 408 U.S. 238 (1972), Mississippi had 8 blacks and 1 white on the row. Under Mississippi's first post-Furman statute, blacks continued to be sentenced to death in disproportionate numbers. At the time the Mississippi Supreme Court decided Jackson v. State, 337 So.2d 1242 (Miss. 1976), remanding all Mississippi death cases for retrial and resentencing, there were 16 known blacks and 3 known whites on the row. The race of four other condemned inmates at that time is unknown. NAACP Legal Defense & Educational Fund, Inc., Death Row USA 4 (July 2, 1976). Under post-Jackson procedures and the 1977 statute, blacks again outnumbered whites on death row. On June 20, 1979, there were 9 blacks and 4 whites. Death Row USA at 7 (June 20, 1979). In the following years there were 7 blacks and 4 whites, id. at 9 (June 30, 1980); 12 blacks and 5 whites, id. at 10 (June 20, 1981); 20 blacks and 10 whites, id. at 10 (June 20, 1982); 20 blacks and 15 whites, id. at 11 (June 20, 1983). Since last June, the black/white ratio has remained essentially the same: 21/16 in August; 22/17 in October; and 21/16, with one Asian, in December. Id. at 11 (August 20, October 20, and December 20, 1983). Meanwhile, 68% of the death sentences affirmed by the Mississippi Supreme Court since Jackson have been in cases of black defendants (15 of 22 affirmances).

The disparity between the Attorney General's 17/17 figure and the 21/16 figure reported in Death Row USA for the most closely corresponding date, i.e., August 1983, is evidently the result of the fact that the Attorney General did not count three of the blacks whose death sentences had been vacated as a result of pending federal habeas corpus

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE IMPORTANT QUESTIONS REGARDING THE USE OF STATE PROCEDURAL RULES TO INSULATE FEDERAL CLAIMS FROM REVIEW ON THE MERITS BY EITHER THE STATE OR THE FEDERAL JUDICIARY

The Court has "consistently held that the question of when and how defaults in compliance with state procedural rules can preclude ... consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. 443, 447 (1965). Since Henry, it has had occasion to consider whether irregularly applied Mississippi procedural rules may serve as an adequate and independent state ground barring federal review. Hathorn v. Lovorn, 457 U.S. 255, 261-65 (1982); see also Chambers v. Mississippi, 410 U.S. 284, 303-08 (1973) (White, J., concurring). This case presents important federal questions regarding Mississippi's recent attempt to insulate its death penalty judgments from federal review by means of a newly adopted and retroactively applied procedural default rule.

A. The Retroactive Application of a Rigid Procedural Default Rule is not an Adequate and Independent State Ground:

Prior to the 1983 trilogy of Edwards, Wheat, and Smith, Mississippi had an historic doctrine of heightened scrutiny in death cases. This doctrine took three forms.

11/ continued

proceedings and one black whose death sentence had been vacated by the Mississippi Supreme Court but whose case was then pending on rehearing. In light of the purpose and effect of the decision below to restrict federal habeas corpus claims for Mississippi condemned inmates, it is particularly significant that of the first six Mississippi cases to go into federal habeas, the writ was granted in five; and, of those five, four involved blacks who had been convicted of killing whites.

The Mississippi Supreme Court adjudicated allegations of error that had not been the subject of a contemporaneous objection in the trial court. See, e.g., Culberson, 379 So.2d at 506. When errors were not assigned on appeal, the court nevertheless reviewed the record to ascertain if there was reversible error. See, e.g., Voyles, 362 So.2d at 1237. On coram nobis, it considered each claim without regard to whether it had been raised on direct appeal. See, e.g., Bell v. Watkins, 381 So.2d at 199.

In the 1983 trilogy, the court not only abandoned the prior rule but also applied its new procedural default canons retroactively to cases that had been decided on direct appeal when the former rule was still in effect. The Mississippi court has thus created

> a situation where a state court has followed a regular past practice of entertaining claims in a procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar.... [A] procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence.

Walker v. City of Birmingham, 388 U.S. 307, 319 (1967) (citing Barr v. City of Columbia, 378 U.S. 146 (1964), and Wright v. Georgia, 373 U.S. 284, 291 (1963)). This Court has only invoked procedural default when the procedural rule applied at the time of the default. See, e.g., Francis v. Henderson, 425 U.S. 536, 537 and n. 1 (1976). Accord Granviel v. Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) ("We cannot enforce against Granviel a contemporaneous objection rule that did not even exist at the time of his trial."). To do otherwise would be to violate basic notions

of due process. See Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

The unfairness of a retroactive application of a forfeiture rule is patent. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance on prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); accord Wright v. Georgia, 373 U.S. at 291; NAACP v. Alabama ex rel Flowers, 377 U.S. 288, 301 (1964); Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958). A Mississippi lawyer handling the appeal of a death case might quite reasonably have relied on the explicit statements of the Mississippi Supreme Court in Voyles and Irving and decided to highlight several issues in his assignments of error and brief while omitting others. Cf. Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987, 994 (1983). He could do so secure in the knowledge that, if he misjudged the importance of an error raised below, the court would still adjudicate the issue as part of its mandatory search of the record.[12/] In the context of a claim of racial discrimination in the administration of a capital sentencing statute, counsel would have even more reason to rely on established doctrine and not raise it on direct appeal. First, he could reasonably expect that the proportionality review required by the Mississippi statute would suffice to

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12/ Similarly, he could do so confident that, if the court did not address the error sua sponte, there would still be no waiver of the client's rights and the claim could be raised on coram nobis.

neutralize any racial factors that may have entered into the defendant's sentence. Moreover, he could reasonably decide that a claim of racial discrimination would make little sense when based on a barren record, that it would be more appropriate in collateral proceedings where the facts could be developed. Since Mississippi law left these options open at the time of petitioner's direct appeal, he cannot now be said to have committed a procedural default by relying on them.

Even if petitioner is incorrect about the apparent consistency of the pre-Edwards law, the rigid Edwards procedural default standard would not bar federal review because it is "based on a standard ... much stricter than that which could have been extracted from the earlier ... cases" Sullivan v. Little Hunting Park, 396 U.S. 229, 245 (1969) (Harlan, J., Burger, C.J., and White, J., dissenting). It cannot be disputed that there was a substantial line of Mississippi precedent suggesting that the normal procedural rules are suspended in capital cases. Even if these cases were to be viewed as a category of exceptions to a broader rule, see Chambers v. Mississippi, 410 U.S. at 303-07,[13/] "a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the

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13/ Justice White's opinion in Chambers identified an exception to the Mississippi contemporaneous objection rule in non-capital cases based on the fundamental nature of the right asserted. He traced this doctrine back through a line of non-capital cases to Carter v. State, 21 So.2d at 404. Chambers, 410 U.S. at 304-07. Carter, a capital case, derived this doctrine from the 1926 Fisher rule that "constitutional rights of a person on trial for his life rise above mere rules of procedure." Fisher, 110 So.2d at 365.

State here, because petitioner cannot fairly be deemed to have been apprised of its existence." NAACP v. Alabama ex rel. Patterson, 357 U.S. at 457.[14/]

Indeed, even if Mississippi had a clear procedural default rule applicable to death cases, it could not serve as an adequate and independent state ground. The Court's decisions "stress that a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' ... State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." Hathorn, 457 U.S. at 262-63 (quoting Barr v. City of Columbia, 378 U.S. at 149). The pre-Edwards cases such as Voyles and Irving; the application of the procedural default rule in Wheat and Smith when it had not been applied in those very cases on direct appeal; the reverse application of the Voyles doctrine of complete review to Wheat and Smith in coram nobis to bar, as res judicata, ineffective assistance of counsel claims that had not been raised on direct appeal; and the Mississippi Supreme Court's recent reversions in Caldwell and Wiley establish the hopeless inconsistency and irregularity of any purported Mississippi procedural default rule.

B. A Procedural Default Rule Adopted for the Purpose of Preventing Later Federal Review of Federal Claims Cannot Serve as an Adequate and Independent State Ground:

In this case, the Court should "inquire

14/ At the very least, the unclear nature of the state procedural law should constitute cause under Wainwright v. Sykes, 433 U.S. 72 (1977). See Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050, 1076-78 (1978) (forfeiture should be overlooked where: "The lawyer's mistake was attributable to the seriously uncertain state of the procedural law....").

whether the enforcement of a procedural forfeiture serves ... a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." Henry, 379 U.S. at 447-48. See also Chambers v. Mississippi, 410 U.S. at 290 n. 3 ("we have no occasion to decide whether -- if such a [state procedural] ground exists -- its imposition in this case would serve any 'legitimate state interest.'") (quoting Henry, supra). A procedural default rule that is adopted for the purpose of frustrating federal review of federal constitutional claims cannot serve as an independent and adequate state ground for the most obvious reason: It is not an independent state ground if it is not based on any legitimate state policy or consideration. Rather, it is a transparent effort to oust the federal courts of their jurisdiction based on a hostility to the federal claim. "A purported state ground is not independent and adequate ... where the circumstances give rise to an inference that the state court is guilty of an evasion -- an interpretation of state law with the specific intent to deprive a litigant of a federal right." Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting). See, e.g., Davis v. Wechsler, 263 U.S. 22 (1923); Ward v. Love County, 253 U.S 17 (1920). The Court should grant the writ to determine whether -- based on the extraordinary origin of the state ground as made clear by the dissent below and the genesis of the rule in Edwards -- the Mississippi rule falls in this exceptional category.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE THE DEGREE TO WHICH RACIAL FACTORS MAY STILL INFLUENCE THE OPERATION OF THE MISSISSIPPI CAPITAL SENTENCING SCHEME

The decision below would foreclose petitioner's claim that the Mississippi capital sentencing scheme continues to discriminate on the basis of racial factors. It would do so although petitioner has never had an opportunity to develop or present the facts that would establish the continuing influence of racial factors in violation of the eighth and fourteenth amendments.

It should be indisputable that:

> If a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by reference to the race of the defendant, the Equal Protection Clause of the Fourteenth Amendment forbids continued enforcement of that statute in its existing form. Cf. Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

Furman v. Georgia, 408 U.S. 238, 389 n. 12 (1972) (Burger, C.J., dissenting); accord id. at 250-56 (Douglas, J., concurring). No capital sentencing statute could stand under the eighth amendment if it "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as the race ... of the defendant...." Zant v. Stephens, ____ U.S. ___, 77 L.Ed.2d 235, 255 (1983).

Similarly, a capital sentencing scheme that explicitly attached an aggravating label to the victim's race would, on its face, violate both the eighth and fourteenth amendments.

> In this context, where the power of the State weighs most heavily upon the individual ...,

> we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses, and exactions of every other kind, and to no other."

McLaughlin v. Florida, 379 U.S. 184, 192 (1964)(quoting 42 U.S.C. § 1981). Here, the available data suggest that, while Mississippi may have a legitimate state interest in imposing death to avenge murder, it is in fact exercising that power to avenge the murder of whites and not blacks. While blacks constitute 75% of the murder victims, only 23% of the death sentences are meted out in black victim cases. This denies blacks "the full and equal benefit of all laws ... for the security of persons...." Id. See Briscoe v. Lahue, ___U.S. ___, 75 L.Ed.2d 96, 109 (1983). When, moreover, the race of the defendant is also factored in, a more stark and classic pattern of discrimination emerges. Amongst those similarly situated (i.e., those who kill whites), blacks are sentenced to death at a rate five times greater than whites, even though white offenders in this category outnumber blacks by a ratio of 4 to 1. This certainly subjects blacks like petitioner to "[un]like punishment [and] pains", id., in violation of the eighth and fourteenth amendments.

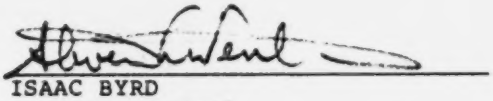
The Court has recently granted a stay of execution in a case that presents similar questions concerning the operation of the Georgia statute. Stephens v. Kemp, No. A-455 (Dec. 13, 1983) (stay granted pending determination of Spencer v. Zant, Zant, ____ F.2d ____, No. 82-8408 (11th Cir.) (pending rehearing en banc)). The Court should grant certiorari and,

together with these cases, consider here the extent to which a facially valid capital sentencing scheme may continue to be influenced by impermissible racial factors.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,



ISAAC BYRD
Owens & Byrd
P.O. Box 19
Jackson, Mississippi 39205
(601) 352-8443

SHIRLEY PAYNE
P.O. Box 1725
Jackson, Mississippi 39215
(615) 352-7059

STEVEN L. WINTER*
99 Hudson Street
16th Floor
New York, New York 10013

ATTORNEYS FOR PETITIONER

*Counsel of Record

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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CONNIE RAY EVANS,

Petitioner,

-v-

THE STATE OF MISSISSIPPI,

Respondent.

==========

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

==========

APPENDIX

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SHIRLEY PAYNE
P.O. Box 1725
Jackson, Mississippi 39215
(615) 352-7059

STEVEN L. WINTER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Attorneys for Petitioner

*Counsel of Record

Connie Ray EVANS

v.

STATE of Mississippi.

No. 53754.

Supreme Court of Mississippi.

Nov. 30, 1983.

Petitioner, who was convicted in the Circuit Court, Hinds County, William F. Coleman, J., and sentenced to death, which judgment and sentence were affirmed on appeal, applied for leave to file petition for writ of error coram nobis. The Supreme Court, Roy Noble Lee, J., held that: (1) those contentions which were not alleged as error and presented on direct appeal could not be raised for first time on application for leave to file petition for writ of error coram nobis and were procedurally barred, and (2) those contentions which were presented and argued on direct appeal and decided adversely to petitioner could not be relitigated on application for leave to file petition for writ of error coram nobis.

Application denied.

Robertson, J., dissented and filed opinion, in which Hawkins and Prather, JJ., joined.

1. Criminal Law ⇐997.7

Question whether aggravating circumstance of commission of murder in especially heinous, atrocious, and cruel manner was established by the evidence was fully and finally litigated on direct appeal from conviction, and could not be relitigated in coram nobis proceeding.

2. Criminal Law ⇐997.2

Contention with respect to finding of aggravating circumstance of commission of offense for purpose of avoiding lawful arrest, not having been alleged as error and presented on direct appeal from conviction, could not be raised for first time on applications for leave to file petition for writ of error coram nobis, and was procedurally barred.

3. Criminal Law ⇐997.7

Contention with respect to finding of aggravating circumstance that petitioner was under sentence of imprisonment at time of offense, having been presented and argued on direct appeal from conviction, could not be relitigated on petition for writ of error coram nobis, and was procedurally barred.

4. Criminal Law ⇐997.7

Contentions relating to admission of color slide evidence, testimony of victim's brother, and police and pathologist testimony, all regarding nonstatutory aggravating circumstances, were presented to the Supreme Court on direct appeal from conviction and decided adversely to petitioner, and, therefore, could not be relitigated on petition for writ of error coram nobis and were procedurally barred.

5. Criminal Law ⇐997.2

Failure of petitioner to allege as error the admission of evidence of bullet and victim's belongings to the Supreme Court on direct appeal from conviction precluded petitioner from raising issue for first time on petition for writ of error coram nobis and was procedurally barred.

6. Criminal Law ⇐997.7

Contention relating to failure of trial court to give jury instruction limiting consideration of aggravating circumstances, having been alleged as error and briefed on direct appeal and rejected by the Supreme Court, could not be relitigated on petition for writ of error coram nobis, and was procedurally barred.

7. Criminal Law ⇐997.7

Contentions that trial court erred in removing juror with scruples against capital punishment and that prosecuting attorney's argument constituted misconduct, both having been presented on direct appeal from conviction and found to be without merit, were res judicata, could not be relitigated on petition for writ of error coram nobis, and were procedurally barred.

8. Criminal Law ⇐997.2

Numerous contentions relating to, inter alia, sufficiency of indictment, refusal to permit defense witness to testify in mitigation of sentence, absence of presentence report, inadequacy of trial judge's report, and proportionality review structure, not having been raised or presented on direct appeal from conviction could not be raised for first time on petition for writ of error coram nobis and were procedurally barred.

9. Criminal Law ⇐997.2

Contentions that death sentence was disproportionate and arbitrary and that death penalty in Mississippi is imposed in discriminatory manner, not having been presented on direct appeal from conviction, were unpreserved and procedurally barred in proceedings on petition for writ of error coram nobis.

Solomon Osborne, Greenwood, for appellant.

Bill Allain, Atty. Gen., Amy D. Whitten, William S. Boyd, III, Sp. Asst. Attys. Gen., Jackson, for appellee.

En Banc.

ON APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS

ROY NOBLE LEE, Justice, for the Court:

Connie Ray Evans was convicted in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and sentenced to suffer death, according to the law of the State of Mississippi. That judgment and sentence were affirmed by a unanimous decision of the Mississippi Supreme Court on November 3, 1982, and petition for rehearing was denied December 15, 1982. *Evans v. State*, 422 So.2d 737 (Miss.1982). The facts recited in the opinion reflect that during the evening hours of April 8, 1981, Evans and his accomplice met and made plans to rob R.J. Food Store located on Lynch Street in Jackson, Mississippi. Evans stated to his accomplice that they might have to kill the storekeeper during the robbery. The next day, Evans and the accomplice robbed the store and clerk of approximately $400.00, and, in the process, Evans shot and killed the clerk.

A petition for a writ of certiorari to the Supreme Court of Mississippi was filed in the United States Supreme Court and that court denied the petition on May 16, 1983. Petition for rehearing was filed and also was denied. Application for Leave to File Petition for Writ of Error Coram Nobis was filed on July 1, 1983, setting out eighteen (18) grounds for relief, each of which we address hereinafter.

I.

Unlawful Application of Statutory Aggravating Factors

A. *The State's Use in Petitioner's Case of the Statutory Provisions that the Murder was "Especially Heinous, Atrocious and Cruel."*

[1] This ground was presented to the Court on direct appeal from Evans' convic-

tion and sentence and was resolved by the Court in the following response:

> In the case sub judice, the victim was forced to kneel on the floor behind the counter with a .38-caliber revolver pointing at his head, he was made to stand up at gunpoint and open the cash register, and again was forced to kneel on the floor with the revolver still pointing at his head. He was physically assaulted by one of the robbers emptying his pockets, all occurring over a short period of time. From those facts, the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel. Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstances of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence. [*Evans v. State*, 422 So.2d 743].

Thus, the matter having been fully and finally litigated on direct appeal, it is *res adjudicata*, may not be relitigated in a coram nobis proceeding, and is procedurally barred.

We note that Evans argues on this point in his petition that "Moreover, as expressly acknowledged by this Court in its review of petitioners's case on direct appeal, there was wholly insufficient evidence to support the jury's reliance upon this aggravating circumstance in imposing a death sentence on petitioner." The argument is misplaced. The response clearly sets out that the aggravating circumstance of being especially heinous, atrocious or cruel was properly submitted for the consideration of the jury and for its determination. The phrase "Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, . . ." is a different way of saying "Assuming arguendo, . . ." or "Even though it may be argued, . . ." or "For the sake of argument, . . ."

B. *The State's Use in Petitioner's Case of the Statutory Provision that Petitioner's Offense was Committed for the Purpose of "avoiding . . . lawful arrest" as an Aggravating Circumstance*

[2] This contention was not alleged as error and presented on direct appeal. The issue may not now be raised for the first time on this application for leave to file the petition for writ of error coram nobis, and it is procedurally barred. *Smith v. State*, 434 So.2d 212 (Miss.1983); *Edwards v. Thigpen*, 433 So.2d 906 (Miss.1983); *Wheat v. Thigpen*, 431 So.2d 486 (Miss.1983).

C. *The Use of the Statutory Provision that Petitioner was "under sentence of imprisonment" at the Time of the Offense as an Aggravating Circumstance*

[3] This contention was presented and argued to the Court on direct appeal (*Evans, supra*, at 741), it may not be relitigated again on this petition and is procedurally barred.

II.

Interjection of Evidence Based on Non-statutory Aggravating Circumstances

A. *Color Slide Evidence*

B. *Testimony of Victim's Brother*

C. *Police and Pathologist Testimony*

[4] The contentions A, B, and C were presented to this Court on direct appeal and were decided adversely to petitioner. Therefore, they may not be relitigated on this petition and are procedurally barred.

D. *Evidence of Bullet and Victim's Belongings*

[5] Petitioner did not allege as error or present same to this Court on direct appeal, the issue may not now be raised for the first time on the petition and is procedurally barred. (*Smith, supra; Edwards, supra*; and *Wheat, supra*).

E. *Failure to Give a Jury Instruction Limiting Consideration of Aggravating Circumstances*

[6] This contention was alleged as error and briefed on direct appeal and was rejected by the Court. It may not now be relitigated on this petition and is procedurally barred. (*Evans, supra*, at 745).

III.

Other Constitutional Errors in the Sentencing Trial

1. *Removal of Juror with Scruples Against Capital Punishment*

2. *The Prosecuting Attorney's Pervasive Pattern of Misconduct*

[7] Evans contends that the lower court erred (1) in removing a juror with scruples against capital punishment, and (2) the prosecuting attorney's argument constituted error. Both of these contentions were presented to this Court on direct appeal and were found to be without merit. (*Evans, supra*, at 740, 746). They are *res adjudicata*, may not be relitigated on this petition and are procedurally barred.

3. *The Absence of a Finding of Intent to Take Life*

4. *The Absence of Notice of Aggravating Circumstances*

5. *Refusal to Allow Petitioner's Witness to Testify on His Behalf Violated Petitioner's Rights under the Eighth and Fourteenth Amendments*

6. *The Absence of a Presentence Report*

7. *Inadequacy of the Trial Judge's Report*

8. *Inadequacy of Appellate Review Procedures*

[8] Evans relies upon *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and contends (3) that he did not kill, attempt to kill, or intend that a killing take place during the robbery, and that the death penalty should not have been imposed. In *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), the court held:

> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. [456 U.S. at 134, 102 S.Ct. at 1575, 71 L.Ed.2d at 804].[1]

He contends that (4) the indictment alleged no aggravating circumstances and that the omission violated his rights under the Fourteenth and Sixth Amendments of the United States Constitution, (5) the lower court's refusal to permit his witness to testify in mitigation of the sentence violated his Eighth and Fourteenth Amendment rights, (6) the absence of a pre-sentence report constituted error, (7) the inadequacy of the trial judge's report was error, and (8) Mississippi's proportionality review structure is inadequate and prejudicial to him.

None of these contentions listed here were raised or presented on the direct appeal, and they are procedurally barred. *Smith, supra; Edwards, supra; Wheat, supra.*

9. *Arbitrariness of the Death Penalty in Mississippi*

10. *Discriminatory Aspects of the Death Penalty in Mississippi*

[9] Evans contends that (9) his sentence is disproportionate and arbitrary and (10) the death penalty in Mississippi is imposed in a discriminatory manner. Those contentions were not presented on the direct appeal, they are unpreserved and are procedurally barred. *Smith, supra; Edwards, supra; Wheat, supra.*

We are of the opinion that the Application for Leave to File Petition for Writ of Error Coram Nobis in the Circuit Court of the First Judicial District of Hinds County, Mississippi, should be denied.

APPLICATION DENIED.

1. *Enmund* was rendered July 2, 1982. Evans was sentenced to death October 15, 1981.

PATTERSON, C.J., WALKER and BROOM, P.JJ., and BOWLING, and DAN M. LEE, JJ., concur.

ROBERTSON, HAWKINS and PRATHER, JJ., dissent.

ROBERTSON, Justice, dissenting:

I.

For at least two decades the writ of error coram nobis has been a post-conviction form of action through which prisoners of the state have filed constitutional challenges to their convictions and sentences. We have venerated this writ, for it fulfills our felt obligation to assure that no person experiences the sting of the state's penal sanctions inconsistent with the constitution.

Secondary but also important is our federalism context. When Mississippi's prisoners have been admonished that their complaints may not be heard in federal court until all viable state remedies have been exhausted, we have insisted that this state affords such a remedy. We have proclaimed it plain, adequate and speedy. As a responsible partner in our federal system we would be remiss if we did not afford state prisoners such a remedy.

Today's decision renders the writ of error coram nobis an empty form of action. It is still on the books. There is simply not much of any importance it may be used for.

After today we have no plain, adequate and speedy post-conviction remedy for adjudication of constitutional issues. Today's decision makes clear that, if such issues are presented at trial and on direct appeal, they are barred on error coram nobis as res judicata. If such issues are not presented at trial and on direct appeal, they are deemed waived. *All constitutional claims are thus precluded from post-conviction review.* Today's decision unmistakably holds that the writ of error coram nobis is no longer a viable form of post-conviction action for the litigation of a prisoner's constitutional claims *no matter how meritorious those claims may be.* The writ has become an ambassador without portfolio.

Because our action today is so out of keeping with my understanding of our judicial responsibilities in cases such as this, I respectfully dissent and set forth my reasons at some length.

II.

A.

We recall the standing the writ of error coram nobis has had.[1]

Though it was available at common law, the writ of error coram nobis has a statutory base in this state. Miss.Code § 99–35–145 (1972). This statute became law over thirty years ago. Miss.Laws, ch. 250 (1952). It was passed out of the legislature's "cognizance of the need to establish an adequate post-conviction remedy". *Smith v. State*, 155 So.2d 494, 495 (Miss.1963).

In *Windom v. State*, 192 So.2d 689 (Miss. 1966), for example, the Court described the coram nobis remedy in this language:

> This Court has provided a plain, adequate and speedy post-conviction remedy for adjudication of all issues that may be raised under the Constitution of the United States or the Constitution of Mississippi.

192 So.2d at 691.

This language was quoted and cited with approval in *Love v. State*, 221 So.2d 92, 94 (Miss.1969). In *Love* the Court went on to insist that:

> "... This state has an adequate post-conviction remedy for an application for relief by persons convicted of crime.

1. Let me emphasize at the outset that I unreservedly join those who would "streamline and clarify post-conviction relief law and procedures" in this state. *Edwards v. Thigpen*, 433 So.2d 906, 907 fn. 1 (Miss.1983). I prefer a single form of action for post-conviction relief which I would call simply a motion, analogous to the federal procedure under 28 U.S.C. § 2255. See also, Rule 81(e), Miss.R.Civ.P., which arguably abolishes all remedial writs, substituting motions. I write here in the context of recent history wherein the writ of error coram nobis has been the only viable post-conviction form of action available after affirmance on direct appeal in this Court.

Even the most hardened criminals are not denied a 'full-blown hearing'"

221 So.2d at 95. [Emphasis added].

The office of the writ of error coram nobis as this state's form of action designed to accommodate post-conviction consideration of constitutional issues was reiterated in *Nelson v. Tullos*, 323 So.2d 539 (Miss. 1975).

In this jurisdiction relief for a defendant who claims to have been convicted as the result of a deprivation of his constitutional rights is by writ of error coram nobis. As this Court pointed out in *Botts v. State*, 210 So.2d 777 (Miss.1968):

> The function of a writ of error coram nobis is to bring to the court's attention some matter or fact which does not appear on the face of the record which was unknown to the court or the parties at the time, and which, if known, and properly presented, would have prevented the rendition of the original judgment. The violation of defendant's constitutional right to be represented by counsel constitutes ground for granting a writ of error coram nobis to correct a former judgment. 18 Am.Jur.2d Coram Nobis § 17 (1965). (210 So.2d at 779).

Accord Clayton v. State, 254 So.2d 874, 875 (Miss.1971); *Allred v. State*, 187 So.2d 28, 30 (Miss.1966).

323 So.2d at 543.

As recently as 1982 we observed that the writ of error coram nobis is the form of remedy available to one mounting a "collateral attack based upon constitutional defects ... [in his] conviction".[2] *Phillips v. State*, 421 So.2d 476, 483 (Miss.1982).

B.

Through the error coram nobis procedure, this Court has repeatedly allowed presentation of constitutional issues which could have been litigated at trial or on direct appeal but for various reasons were not.

Fondren v. State, 199 So.2d 625 (Miss. 1967) typically reflects the office of our writ of error coram nobis. Thomas Earl Fondren had been tried and convicted of burglary. This Court had affirmed on the merits. *Fondren v. State*, 253 Miss. 241, 175 So.2d 628 (1965). Two years later Fondren sought release via writ of error coram no-

2. We are, of course, in no way bound by the view of our procedure taken by any federal court. I nevertheless regard as entirely correct the views expressed by the United States District Court for the Northern District of Mississippi in *King v. Cook*, 287 F.Supp. 269 (N.D. Miss.1968). *King* was an exhaustion of remedies case. A state prisoner was seeking federal habeas corpus relief. As a prerequisite to his federal action, he had to "exhaust" any state remedies "*available*" and "*effective*". 287 F.Supp. at 272. [Emphasis added]. In this context U.S. District Judge Claude F. Clayton made these comments regarding Mississippi's error coram nobis remedy:

> ... [A] writ of error coram nobis in Mississippi is of *broad scope and range, particularly giving cognizance to violation of constitutional rights occurring in criminal trials*. 287 F.Supp. at 271. [Emphasis added].

Judge Clayton then considered the Georgia post-conviction remedy which had been recognized as "available" and "effective" by the United States Court of Appeals for the Fifth Circuit, and observed that the Court of Appeals,

> ... in holding that the state procedures might not be bypassed, applauded the "far reaching" act as an effective remedy for securing state court review of federal challenges to state convictions. It is the conclusion of this court that the statutory scheme enacted by Mississippi is not substantially different and no less effective than that provided by Georgia. 287 F.Supp. at 272.

The District Court concluded with this language:

> Thus it is seen that Mississippi, in enacting § 1992.5, had a comprehensive procedure for the rehearing of criminal cases, wherein errors of a constitutional nature have occurred, as early as 1952, at which time Georgia still severely restricted the scope of its post-conviction remedies. The purpose of the Mississippi legislature in enacting § 1992.5 was *to provide a meaningful and effective procedure for the protection of constitutional rights of those convicted of crime and the highest court of the state has interpreted the act in accordance with that purpose*. Therefore, this court will stay its hand until petitioner has pursued those remedies provided to him by the State of Mississippi. 287 F.Supp. at 272. [Emphasis added].

Judge Clayton's eyesight in 1968 was twenty-twenty. Why the majority has found it desirable or appropriate to restrict that view has not been explained.

bis. He assigned an alleged denial of his constitutional right to trial before a jury drawn from a fair cross-section of the community. He alleged that in fact black persons had long been excluded systematically from juries in his county and that this exclusion rendered constitutionally infirm his conviction and sentence. This Court granted relief on the merits. *Fondren v. State*, *supra*, 199 So.2d at 626–627. In *Fondren* the systematic exclusion claim was *not* held procedurally barred. Fondren had not timely raised the issue at trial. He had not assigned it as error on direct appeals. In spite of these failures, when the case reached this Court two years later via error coram nobis, *we reached the merits and granted relief.* There was no waiver of the claim "since the proof shows that he [Fondren] was not advised of his rights by prior counsel". 199 So.2d at 626.

What is important about *Fondren* is that the constitutional infirmity in Fondren's conviction is in fact just as procedurally barred as is Evans'. Evans' procedural default is qualitatively the same as Fondren's, no more, no less. Fondren's "barred" constitutional claim was considered on its merits. Why *Fondren* does not require similar treatment of Connie Ray Evans' constitutional claims escapes me.

C.

There is another context in which we have routinely ignored so-called "procedural bars" and allowed prisoners to present their constitutional claims via error coram nobis. These cases have arisen when the prisoner has pleaded guilty, had his plea accepted and been sentenced. Later he seeks error coram nobis relief on constitutional grounds. The plea of guilty constitutes a waiver of an accused's most basic constitutional rights. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274, 279 (1969); *Phillips v. State*, 421 So.2d 476, 479 (Miss.1982). We have nevertheless proceeded to adjudicate the merits of such cases—almost routinely. See, e.g., *Echoles v. State*, 254 Miss. 133, 180 So.2d 630 (1965) (prisoner allowed to challenge sufficiency of indictment even though he voluntarily pleaded guilty and waived his rights).

Arguably there is a qualitative difference in the *Echoles* waiver and that involved here. Echoles' guilty plea was knowing and voluntary on his part. Evans' "waiver" undergirding the majority's view is predicated upon the inactions of counsel in which no one could say Evans was a knowledgeable participant. If Echoles was entitled to be heard on the merits of his claim, Evans is even more certainly similarly entitled.

III.

Connie Ray Evans, III has now presented to this Court his petition for a writ of error coram nobis. He charges that his death sentence is infected with no less than sixteen infirmities, each said to be of constitutional dimension. He has done this via an application adequate under Rule 38, Miss. Sup.Ct. Rules, an application which lays bare much flesh to many of his substantive claims.

The majority holds each of Evans' claims procedurally barred, apparently accepting the State's candid and (to my mind) shocking insistence that:

> Any relative merit which might be found in the [sixteen constitutional] claims is afforded *no* consideration where the machinery for preserving the claim has gone unused.

State's Brief, p. 11. [Emphasis added].

The majority would have Evans die, not because the proceedings at trial and on direct appeal were fundamentally fair or constitutionally adequate, but because his lawyer goofed. We have here no suggestion that defense counsel chose deliberately to bypass the trial and appellate process. The State does not argue that defense counsel eschewed presenting these sixteen constitutional claims as a matter of conscious trial tactics. Connie Ray Evans, the center and subject of this kafkaesque nightmare, no doubt has not the slightest comprehension of his lawyer's inaction at trial or our action here. Decisions that life be taken should be made of more solid stuff.

The majority opinion is, I submit with sincerest respect and deference, in grave error on two fronts—first, in its unjust impact on the man whose life is here on the line; and, second, in its complete evisceration of the coram nobis post-conviction remedy.

Make no mistake about the implications of the procedural bar the majority would impose upon Connie Ray Evans. It presumes that, in at least sixteen different particulars, Evans' rights secured by the Constitution of the United States may have been violated. No matter. The majority holds that Evans must die, *his sixteen federal constitutional claims never having been considered on their merits by anyone.* What state interest requires such a fateful step wholly escapes me!

Second, and to my mind even more disturbing, are the institutional ramifications of the majority opinion. The writ of error coram nobis, as we have heretofore known it, has been substantially eviscerated.[3] After today's decision, *there is no post-conviction relief available in this Court on questions of criminal constitutional law!*[4]

Consider the logic implicit in the majority opinion. Alleged violations of constitutional and other rights must be objected to at trial and then raised as assigned errors if they are to be preserved for consideration on their merits on direct appeal. If error is *not* properly preserved, then such error may not—says the majority—be asserted as a basis for post-conviction relief because of procedural bar. If, however, the defendant preserves the error, the majority nonetheless denies post-conviction proceedings because all such preserved errors have been reviewed on direct appeal and are thus *res judicata*.[5] The majority opinion allows neither preserved nor unpreserved error to be raised for post-conviction review. If this be the law, it is difficult to imagine why we ever thought it necessary to have a post-conviction remedy for the litigation of constitutional claims at all.[6]

IV.

The dissent I register here is undergirded by a powerful principle well stated by this Court over thirty years ago in *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950).

3. Presumably the writ may still be used to present ineffective assistance of counsel claims. *Read v. State*, 430 So.2d 832, 836–842 (Miss.1982). It may also continue to serve its common law function as a form of action through which a prisoner may call to the court's attention some matter of fact not appearing on the face of the record and unknown at the time of trial. *Petition of Broom*, 251 Miss. 25, 32–33, 168 So.2d 44, 48 (1964); *Allred v. State*, 187 So.2d 28, 30–31 (Miss.1966); *Nelson v. Tullos*, 323 So.2d 539, 543 (Miss.1968).

4. This case must be confined to its procedural context: trial on the merits ending in conviction and sentence, affirmance on direct appeal, followed by an application here for post-conviction relief via writ of error coram nobis. Of course, *all* post-conviction applications by death row inmates are likely to be made in this procedural context. I trust no one will suggest any implied modification or repeal of the habeas corpus procedure provided in RULE 8.07 of Uniform Criminal Rules of Circuit Court Practice effective August 16, 1979. In such cases the prisoner applies to the circuit court. That procedure has supplanted and now encompasses all post-conviction actions wherein the original proceedings terminated at the trial court level and the prisoner's initial application is made to a circuit court. By way of contrast, we are here concerned with cases where this Court last had jurisdiction and where heretofore the writ of error coram nobis initially sought here was the only viable remedy. See Rule 38, Miss.Sup.Ct. Rules.

5. Let me be clear that I wholly agree that res judicata does set in once an issue has been finally adjudged on its merits and affirmed on direct appeal. In such cases the defendant has had his day in court on any such issue. Of course, where a man's life is on the line it would seem appropriate for the Court to recognize plain error. In the absence of plain error, however, there seems to me to be nothing objectionable in the application of res judicata to preclude relitigation via error coram nobis of constitutional claims adjudged on their merits on direct appeal.

6. Culminating with *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), the Supreme Court of the United States has been engaged in a constant and conscious effort to afford the states full opportunity to handle the merits of their prisoner's post-conviction complaints. Today's decision makes clear that you can lead a horse to water but you cannot make him drink.

> Constitutional rights in serious criminal cases rise above mere rules of procedure.

209 Miss. at 155, 46 So.2d at 97.

This principle was restated with approval in *Gradsky v. State*, 243 Miss. 379, 384, 137 So.2d 820, 821 (1962). Its current vitality is attested by the Court's recent decisions in *Read v. State*, 430 So.2d 832, 837 (Miss. 1983); and *Richardson v. State*, 436 So.2d 790, 791 (Miss.1983). See also, my dissenting opinion in *Hill v. State*, 432 So.2d 427, 443–451 (Miss.1983).

This principle has force for a more fundamental reason: it is intuitively and demonstrably *just*. The point is graphically illustrated by imagining the converse principle: In serious criminal cases, fundamental constitutional rights are subordinated to mere rules of procedure. No court would consciously embrace such an exhaltation of form over justice, yet such is the inescapable implication of the majority opinion.

There is a practical reason why strict adherence to the spirit of *Brooks* is so important here. Death penalty litigation has become highly specialized. Few Mississippi lawyers have even a surface familiarity with the seemingly innumerable refinements put on *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and progeny.[7]

We have reviewed the record in numerous death penalty cases in recent years. Generally, we find that a vigorous all-out defense is made, although there are exceptions. Generally speaking, the Mississippi Bar has reason to be proud of the vigor and competence with which its members have defended capital cases. On points that arise regularly in criminal cases of all descriptions—change of venue, insanity defense, pretrial motions to suppress statements and evidence, trial tactics generally, jury instructions, and the like—our bar has performed well. What happens frequently, however, and what has happened in this case, is that—as a conventional criminal case—the case was well tried. In spite of this, numerous important and highly technical death penalty issues were not raised. Most of the sixteen issues presented on this petition are issues which have resulted in death sentences being vacated in other cases. These are points of law with which the average Mississippi criminal defense lawyer has no familiarity.[8]

Nothing said here suggests any inference that we here deal with ineffective assistance of counsel. Nonetheless, there can be no doubt that counsel's ignorance of the constitutional issues at stake in a capital case is responsible for many procedural defaults here. It follows to my mind that we ought decide these cases on the merits of the issues tendered, procedural niceties to the contrary notwithstanding.

V.

The majority opinion relies on a trilogy of recent decisions as supporting the proposition that we now have a blanket rule requiring enforcement of procedural bars on constitutional claims asserted in death penalty cases via application for writ of error coram nobis. *Edwards v. Thigpen*, 433 So.2d 906 (Miss.1983);[9] *Wheat v. Thigpen*, 431 So.2d 486 (Miss.1983); and *Smith v. State*, 434 So.2d 212 (Miss.1983). In my view, none of these cases is nearly so broad.

Despite the fact that the majority offers *Edwards* as a case in which the blanket rule requiring procedural bar was invoked, only six of seven assignments of error in *Edwards* were treated as either res judicata [10]

7. For a survey of these "refinements" see my article *Fleshing Out the Premises and Procedures for Capital Murder Trials*, 8 Voir Dire 6 (1982).

8. This situation is analogous to that in the *Fondren* case discussed above. *Fondren v. State*, 199 So.2d 625 (Miss.1967). In *Fondren*, defense counsel at trial and on direct appeal no doubt was unfamiliar with the then evolving "systematic exclusion" issue.

9. I specially concurred in *Edwards* expressing briefly reservations comparable to those I express here at more length. *Edwards v. Thigpen*, *supra*, 433 So.2d at 909.

10. Technically speaking, res judicata is a form of procedural bar. It is one which does not seriously concern me because in such situations the prisoner has had a full dress adjudication of his constitutional claims on their merits

or procedurally barred. The fifth assignment of error—whether Edwards possessed an intent to kill—was treated unequivocally on the merits. 433 So.2d at 908. The issue could have been found res judicata as the direct appeal opinion discussed the sufficiency of evidence for finding that Edwards was the killer. 413 So.2d at 1013. The issue also could have been found procedurally barred because the issue—both at trial and on direct appeal—was "less than precisely framed" and thus not preserved. 433 So.2d at 908. Even though such methods for disposing of the issue on procedural grounds were available, the court, nonetheless, reached the merits. Obviously, no "blanket rule" is enunciated by this case.

In *Wheat v. Thigpen*, five of the points raised on post-conviction proceedings had been previously decided by this Court on direct appeal. Cf. *Wheat v. State*, 420 So.2d 229, 232 (Miss.1982). Three other issues—alleged improper closing argument at the guilt phase, alleged improper jury instructions at the sentencing phase, and alleged improper closing argument at the sentencing phase—were neither preserved at trial nor presented to this Court on direct appeal. *Wheat* holds the three unpreserved claims procedurally barred. Nothing in the opinion, however, attempts to articulate a rule going beyond the facts of the particular case. Nothing in *Wheat* purports to announce a general rule requiring enforcement of procedural bars precluding litigation of all constitutional claims in all death penalty post-conviction proceedings.

In *Smith v. State*, 434 So.2d 212 (Miss. 1983), the Court cites a number of cases for the proposition that this Court holds that post-conviction relief is not available on issues which could or should have been litigated at trial or on appeal.[11] Neither

(although I would allow "plain error" leeways even there). My target here is the waiver procedural bar which, if enforced, may mean that no court will ever consider the merits of the constitutional claim.

11. 434 So.2d at 215. The cases cited in Smith and their actual holdings are as follows. In *Wetzel v. State*, 225 Miss. 450, 76 So.2d 188 (1944), the Court eschewed the procedural bar to the coram nobis petition consequent to the circuit court's refusal to grant the petition and instead held: "... the Court will consider this petition en banc in a regular term on its merits, as being addressed to the inherent constitutional powers of the court in its revisory capacity with reference to a case pending before it."
255 Miss. at 483, 76 So.2d at 198.
Goldsby v. State, 226 Miss. 1, 86 So.2d 27 (1956) was one of the early cases involving the charge of systematic exclusion of black persons from jury service, a constitutional issue. The Court stated:
It should have been raised in the lower court.
226 Miss. at 27, 86 So.2d at 32.
Despite the Court's reference to untimeliness, the petition was examined on its merits and denied for lack of proof by affidavit, nor for procedural default. 226 Miss. at 28-29, 86 So.2d at 32.
Rogers v. Jones, 240 Miss. 610, 128 So.2d 547 (1961), holds that the writ of habeas corpus in this state has a more restrictive purpose than that allowed in the federal courts. Petitioner Rogers was denied habeas corpus relief, with the Court stating that if he had a remedy it was the coram nobis remedy. By no stretch of the imagination can it be said that *Rogers* stands for the proposition that constitutional issues not presented at trial or on appeal are forever foreclosed from consideration on coram nobis.
In *Rogers* the Court did make this statement:
It has been said that the right to issue a writ of error coram nobis is founded on the inherent power of the court over its judgments and proceedings. See *Hawie v. State*, 121 Miss. 197, 83 So. 158.
240 Miss. at 619, 128 So.2d at 551.
In *Kennard v. State*, 246 Miss. 209, 148 So.2d 660 (1963), the relief was denied on grounds that
This is a re-argument of the case on the merits of that issue. It was fully discussed in our original decision affirming the conviction.
246 Miss. at 211, 148 So.2d at 661.
In other words, the rejection of coram nobis relief in *Kennard* was on res judicata grounds, not on grounds that the issue had not been timely preserved.
In *Gordon v. State*, 160 So.2d 73 (Miss.1964), the Court found a waiver of the constitutional issue pertaining to the systematic exclusion of blacks from the jury. This waiver was essentially in the nature of finding that the failure to raise the issue in a timely manner was either a deliberate by-pass or an admission that the issue was frivolous. Gordon's first trial had been reversed on precisely this juror-exclusion issue. 243 Miss. 750, 753, 140 So.2d 88, 89 (1962), *cited in* 160 So.2d at 74. *Gordon* made no showing "on the merits" of this claim. 160 So.2d at 76. Given "all of these circumstances," the Court found a waiver of the constitutional issue. This sort of careful consideration

Smith, nor *Edwards* nor *Wheat*, hold that *fundamental constitutional issues*—that are neither raised at trial nor assigned as error on direct appeal—are foreclosed from presentation on post-conviction; such a holding would necessitate overruling many prior cases. See *Hill v. State*, 432 So.2d 427, 443–451 (Miss.1983) (Robertson, J., dissenting).

VI.

The majority relies on *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1988), in support of the proposition that petitioner's constitutional claims not presented at trial or preserved on direct appeal should be deemed procedurally barred. This citation is out of place. *Isaac* literally concerns another world.

Isaac articulates principles to be applied by federal courts, not state courts. In *Isaac*, a federal court is being asked to interfere with the final judgment of the highest court of a state. By way of contrast, Evans asks this Court in effect to reconsider *its own prior final judgment*, something we have inherent authority to do. *Wetzel v. State*, 225 Miss. 450, 483, 76 So.2d 194, 198 (1954); *Rogers v. Jones*, 240 Miss. 610, 128 So.2d 547, 551 (1961).

of the "cause" (deliberate by-pass) and the "prejudice" (issue was frivolous) is an intelligent and reasonable manner for evaluating post-conviction claims by the state that issues ought be held procedurally barred.

In *Irving v. State*, 194 So.2d 239 (Miss.1976), the application for a writ of coram nobis alleged matters which had been considered on direct appeal and were thus res judicata. The opinion of the Court makes no reference to constitutional issues and, accordingly, offers no support for any broad application of procedural bar.

In *Auman v. State*, 285 So.2d 146 (Miss. 1973), petitioner failed to comply with Rule 38, and such noncompliance could be sufficient grounds for dismissal. Nonetheless, the Court "considered petitioner's application on its merits", thus overlooking again a procedural nicety. 285 So.2d at 147.

Bell v. Watkins, 381 So.2d 118 (Miss.1980), is an opinion on the merits. The Court "carefully and meticulously considered each allegation of the petitioner's complaint," some of these issues having been before the Court "no less than four times". 381 So.2d at 119. Despite res judicata options, the Court chose instead to find issues "lacking in merit". 381 So.2d at 119. That we are not the only ones to so read the *Bell* opinion is made evidence in *Bell v. Watkins*, 692 F.2d 999, 1003–041 (5th Cir. 1982).

Callahan v. State, 426 So.2d 801 (Miss.1983) states a combination res judicata/deliberate by-pass rule. 426 So.2d at 803. First, the Court emphasizes that, "The writ of error coram nobis will not be allowed to relitigate questions of law or fact already decided by this Court [on direct appeal]. 426 So.2d at 803.

Second, the Court emphasizes that points may not be raised on post-conviction proceedings which were deliberately held back at the time of direct appeal. 426 So.2d at 803. Suffice it to say that there is nothing whatsoever in the *Callahan* opinion that precludes initial consideration, via petition for writ of error coram nobis, of constitutional questions unless there has been a deliberate by-pass. See my dissenting opinion in *Hill v. State*, 432 So.2d 427, 450, 451 (Miss.1983).

The dominant interest underlying the *Isaac* principle is comity—the federal court's comity obligation to respect the competence of state courts and the finality of state adjudications. *Isaac* is describing the circumstances under which a federal court should be reluctant to interfere with a final judgment of this Court. This is what—and all—that is said in the sentence from *Isaac* quoted by the majority.

Isaac is *wholly irrelevant* when this Court is being asked to reconsider its own judgment. There are no comity considerations present. We are on the other side of the *Isaac* situation. Not one word in *Isaac*, not one thought articulated in the opinion, has the slightest application to the question of whether a state court ought hear, on post-conviction proceedings, constitutional claims not timely presented on direct appeal. We fashion our own rule on this question.

Despite the total inapplicability of the decision in *Isaac* to this Court, an examination of the facts in *Isaac*—facts under which state, procedural bars may be enforced—is instructive. *Isaac* is not a death penalty case. The Supreme Court of the United States has repeatedly held that death is different.[12] In its "death is differ-

12. Concurring in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Justice Stewart wrote:

ent" cases, the Court has articulated interests and premises which are simply not present in non-capital cases. Because the penalty is qualitatively different in severity and finality from any other punishment known to our law, it makes no sense that the procedural rules of *Isaac* should be applied *the same as in non-capital cases*.

VII.

It is important to understand the reasons why the State urges that the issues tendered be disposed of on procedural grounds only. The State's articulated motivation is to short-circuit anticipated federal court review via habeas corpus under 28 U.S.C. § 2254. The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case.[13] The State not only asks that we refuse to address Evans' claims on their merits but unashamedly further seeks our aid in avoiding litigation of Evans' sixteen *federal* constitutional claims in any *federal* court.

The Attorney General and this Court have become interested in invoking procedural bars in death penalty cases only in recent years. Prior to the death penalty moratorium which covered the last half of the 1960s and most of the 1970s, procedural bars in death penalty cases were unheard of. For a collection of authorities to this effect, see my dissenting opinion in *Hill v. State*, 432 So.2d 427, 443–45 (Miss.1983).

A review of recent history is instructive—and reveals our affection for procedural bars to be particularly unseemly.

In seven cases, those of Richard Gerald Jordan,[14] Johnny Lewis Washington,[15] Jimmy Lee Voyles,[16] Charles Sylvester Bell,[17] John Buford Irving,[18] Larry Jones[19] and

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. 408 U.S. at 306, 92 S.Ct. at 3760, 33 L.Ed.2d at 388.

This theme, the unique nature of the death penalty, has been repeated time and time again. See, e.g., *Furman v. Georgia*, *supra*, 408 U.S. at 287–289, 92 S.Ct. at 2751, 3752, 33 L.Ed.2d 376–378 (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 187–188, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); *Gardner v. Florida*, 430 U.S. 349, 357–358, 97 S.Ct. 1197, 1204–05, 51 L.Ed.2d 393, 402 (1977); *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861, 2869, 53 L.Ed.2d 982 (1977); *Lockett v. Ohio*, 438 U.S. 586, 604–605, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973, 989–990 (1978); *Beck v. Alabama*, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392, 393, 403 (1980); and *California v. Ramos*, — U.S. —, —, 103 S.Ct. 3446, 3451, 77 L.Ed.2d 1171, 1179 (1983).

13. The courts of the United States, led by the Supreme Court of the United States, have created an anomalous, if not absurd, posture for federal post-conviction litigation. If a state court adjudicates the merits of a substantive federal constitutional claim, then federal courts have full power to "review" the federal claim. In such instances, the state prisoner gets two separate adjudications on the merits of his federal constitutional claim—one in the state courts, the other in the federal courts. On the other hand, if the state court rejects the federal constitutional claim by reason of some procedural default of the prisoner, it is clear, at least in non-capital cases, that the federal courts will regard the state procedural bar as an independent and adequate state ground and, accordingly, refuse to hear the merits of the prisoner's substantive federal constitutional claim. *See, e.g., Wainright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). If such a rule be applied in death penalty cases, then the defendant will be dispatched to the gas chamber without anyone ever having considered on the merits his federal constitutional claim.

14. *Jordan v. State*, 365 So.2d 1198 (Miss.1978)

15. *Washington v. State*, 361 So.2d 61 (Miss. 1978)

16. *Voyles v. State*, 362 So.2d 1236 (Miss.1978)

17. *Bell v. State*, 360 So.2d 1206 (Miss.1978)

18. *Irving v. State*, 361 So.2d 1360 (Miss.1978)

19. *Jones v. State*, 381 So.2d 983 (Miss.1980)

Willie Reddix,[20] we have affirmed final judgments of conviction and sentences of death. We have thereafter denied coram nobis and other post-conviction relief in each of these cases. Subsequently, in each of these cases, for one reason or another, courts of the United States have vacated the death sentences.[21] In each case, a federal court has held that imposition and carrying out of the sentence of death would be inconsistent with one or more provisions of the Constitution of the United States. In doing so, however, the federal judiciary has in no way interfered with any of our prerogatives on questions of state law. Indeed, the federal judiciary has bent over backwards in granting to us full berth on questions of state law. See, for example, the federal judiciary's response to our arguably dubious rewriting of an earlier death penalty statute in *Jackson v. State*, 337 So.2d 1242 (Miss.1976); *see Jordan v. Watkins*, 681 F.2d 1067, 1077–78 (5th Cir.1982); *Bell v. Watkins*, 692 F.2d 999, 1010 (5th Cir.1982); *Irving v. Hargett*, 518 F.Supp. 1127, 1133–34 (N.D.Miss.1981). It is in this context that we are presented with an undisguised demand that this Court assume an adversary position.

We sit as the highest court of the State of Mississippi, the court of last resort on all questions of state law. By virtue of the Supremacy Clause, we are obligated faithfully to enforce, not to subvert, the Constitution of the United States as the supreme law of the land. *Bolton v. City of Greenville*, 253 Miss. 656, 666, 178 So.2d 667, 672 (1965); *Sanders v. State*, 429 So.2d 245, 248, 251 (Miss.1983). The best way to insulate our decisions from federal "tampering" is to get the cases right here. If this means reading the decisions of the Supreme Court of the United States and of the United States Court of Appeals for the Fifth Circuit as they are, rather than as we wish they were, so be it.

This State has an important interest in the enforcement of its capital murder statute, specifically including the death penalty portion thereof. That interest is not served by the Attorney General's continued insistence that we blink at federal constitutional rights vested in those accused of capital crimes. Death penalty litigation is in a new era. It is still evolving. Because human life is at stake, this evolution is necessarily a tortuous process. As a major participant in that process, we would serve best the legitimate interests of this State and its people by washing our own linen, rather than pretending that it's not dirty and then reacting with a fit of pique when the federal courts hold to the contrary.[22]

We ought be no more offended that federal courts have the final say on questions of federal constitutional law than are the federal courts about the fact that we have the final say on questions of state law. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and progeny. Indeed the federal judiciary's deference to our interpretations of state law has been most ungrudging. See, e.g., *Jordan v. Watkins*, 681 F.2d 1067, 1077–1080 (5th Cir. 1982); *Walters v. Inexco Oil Company*, 670 F.2d 476 (5th Cir.1982). It would seem to

20. *Reddix v. State*, 381 So.2d 999 (Miss.1980)

21. See *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981); *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.1982), clarified sub nom. *Jordan v. Thigpen*, 688 F.2d 395 (5th Cir.1982); *Bell v. Watkins*, 692 F.2d 999 (5th Cir.1982); *Voyles v. Watkins*, 489 F.Supp. 901 (N.D.Miss.1980); *Irving v. Hargett*, 518 F.Supp. 1127 (N.D.Miss. 1981); *Reddix v. Thigpen*, 554 F.Supp. 1212 (S.D.Miss.1983); *Jones v. Thigpen*, 555 F.Supp. 870 (S.D.Miss.1983). The one case left undisturbed by federal post-conviction review was that of Jimmy Lee Gray. See *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982)

22. I am very much aware of the implications of what I write here for this Court and the workload shouldered by its members and staff. Death penalty cases have created serious institutional problems for courts, state and federal, around the country. They consume more time and sap more of our energies and emotions than any other type of case. Seemingly they never end. And their number is mounting. See *Caldwell v. State*, — So.2d —, — (No. 54,285 decided November 16, 1983, and not yet reported); *Tokman v. State*, 435 So.2d 664, 673 (Miss.1983). Still when a man's life is at stake our oaths demand that we regard no burden too back-breaking to bear.

follow that we ought give a comparable respect to the competence of the federal judiciary in questions of federal law.

In every case that comes before this Court, and certainly in ones in which a man's life is on the line, our duty is clear. We must decide the case on the law and the facts, fearlessly and without looking over our shoulders at some other court. Our solemn responsibility is to decide each case as though there were no other court. To the extent that we act out of interest in what some other court may do in the future, we demean ourselves. We are judges, not advocates.

That seven out of the first eight of our cases to be reviewed in the federal courts resulted in the sentence of death being vacated ought to tell us that we have not been doing something right. Emphatically, this is not an occasion for our becoming advocates and devising procedural mechanisms for the blatantly obvious purpose of reducing the chances that death sentences affirmed here may be vacated by a federal court. Our obligation on our oaths is to decide carefully the merits of each constitutional claim tendered by each person sentenced to die. Our eye must be affixed to justice, not slanted toward *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

VIII.

We have emphasized above that the state does have an interest in the finality of criminal proceedings. We here flesh out what that means.

Once a criminal conviction has been finally affirmed in this Court and the time for further direct review has expired, the state's finality interest vests. It is by no means unreasonable or unfair that at this point an additional burden be placed upon the prisoner. Still we perceive no course of logic which would yield the conclusion that finality is the only interest then at stake. If it be shown that the prisoner's conviction or sentence be infected by substantial violations of rights secured by the Constitution or laws of the United States or of this state; and if it further be shown either that had these violations not occurred, the proceedings at trial would have been substantially more favorable to the prisoner or, that there exists good cause why the points were not raised on appeal; then the force of the state's finality interest is overcome.

A review of all of our cases makes clear that this Court has taken a flexible, and admittedly not altogether consistent, approach to post-conviction proceedings. On the one hand, there is much to be said for a continuation of this flexibility. On the other hand, we submit that the administration of justice will be enhanced by announcing general principles to be applied.

Whenever a prisoner, who has been finally convicted in the courts of the State of Mississippi and whose conviction has been finally affirmed by this Court, seeks post-conviction relief in this Court, and where such prisoner claims that his conviction and sentence have been infected by violations of rights secured to him by the Constitution of the United States or by the Constitution and laws of the State of Mississippi, and where the issues presented had not previously been tendered on direct appeal, the prisoner should be required to show either

(a) that there exists good cause why the point was not procedurally preserved at trial, or raised on direct appeal, or both, as the case may be,

or

(b) that the rights violations asserted did in fact subject him to a substantial detriment at trial; that is, had the rights violations not occurred, the trial process—as distinguished from its outcome—would likely have been more favorable to him than it was.

Beyond that, there is no sound reason why this Court should erect a procedural rule which would bar it from noticing, on direct appeal or on post-conviction proceedings, plain error. This Court's first duty is to administer justice.

Wainwright v. Sykes and *Engle v. Isaac* were never intended to encourage and insu-

late state court irresponsibility. Rather, they are a part of a fundamental shift in emphasis within our system, whereby greater responsibility for the adjudication of substantive constitutional rights is being assumed by the highest courts of the several states. Without doubt the most certain way to assure that the charter will be revoked is for the states to default in their responsibilities.

In my view, our decision on Evans' petition should be as follows:

First, with respect to all claims asserted which were adjudicated on their merits on direct appeal, the petition should be dismissed. The previous adjudication is final. Res judicata precludes relitigation in the courts of this state.

Second, with respect to non-constitutional claims which either (a) were not properly preserved at trial or (b) were not presented on direct appeal, those claims have been effectively waived. In its supervisory capacity over its own judgments, this Court has the capacity to notice errors of this sort. Our plain error rule applies here equally as it does on direct appeal. Suffice it to say that in the case at bar I detect no alleged non-constitutional errors sufficiently plain to be noticed here.

Third, with respect to those claims asserted by Evans which are of constitutional dimensions, federal or state, and with respect to which the claim either was not timely preserved at trial and/or presented on direct appeal, we should hear Evans' claims provided he can demonstrate either cause or prejudice. Again, the Court retains plain error powers even though neither cause nor prejudice be shown.

IX.

Today we hold that Connie Ray Evans must die. We hold this though Evans has presented to us sixteen reasons of constitutional proportions why his sentence is unlawful. The net effect of today's decision is that no court may ever consider the merits of any of Evans' points. He must die not because he has been convicted and sentenced consistent with the constitution, but because his lawyer made mistakes.

Today's opinion, with deference to my colleagues, turns back the clock. Today we announce an abdication of our responsibilities to administer justice to persons within our jurisdiction. We turn our back on responsible federalism.

In *Allred v. State*, 187 So.2d 28 (Miss. 1966) we posed the question:

> What remedy then is open to a defendant in the state courts, who claims to have been convicted because the State obtained his conviction by violating his constitutional rights? 187 So.2d at 30.

Today's answer is loud and unequivocal: NONE!

HAWKINS and PRATHER, JJ., join in this dissent.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,754

CONNIE RAY EVANS

V.

STATE OF MISSISSIPPI

ORDER RESETTING EXECUTION DATE

It appearing unto the Court that a stay of execution in this cause was granted pending final disposition of an Application for Leave to File Petition for Writ of Error Coram Nobis; and

It further appearing that on November 30, 1983, said Application was denied;

IT IS, THEREFORE, ORDERED that Wednesday, December 21, 1983, be and the same is hereby set as the date of execution of the death penalty as provided by law.

ORDERED this the 30th day of November, 1983.

Roy Noble Lee

ROY NOBLE LEE, JUSTICE

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,754

IN RE: CONNIE RAY EVANS

ORDER STAYING EXECUTION

The Court having considered the Application for Stay of Execution filed by the appellant/petitioner, the date of execution now being set for December 21, 1983, and from the application finding that the appellant/petitioner has filed a Petition for Rehearing pursuant to Miss. Sup. Ct. Rule 14;

IT IS, THEREFORE, ORDERED that the execution of appellant/petitioner be stayed pending final disposition of the Petition for Rehearing.

IT IS FURTHER ORDERED that the Clerk of this Court notify counsel for appellant/petitioner and the State of Mississippi, along with the proper state and local officials, as to the stay of execution.

SO ORDERED this the 13th day of December, 1983.

Roy Noble Lee

ROY NOBLE LEE, JUSTICE

ATTEST

A True Copy

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN JANUARY 25, 1984
(Continued - Page 17)

WALKER, P.J., (Cont'd):

55,015 Milton Pharr, Dalton R. Franks and Melvin Jeffords, Jr. v. State; Circuit, Leflore; Motion to Dismiss Appeal Overruled.

CC-2104 James L. Hooten v. State; Petitioner's Motion that Trial Counsel be Appointed to Handle Petitioner's Appeal Overruled. Motion to be Transferred to Parchman and Assigned to Chaplain's Office Overruled. Circuit Court of Jackson County Authorized to Inquire into Indigency of Petitioner and Appoint Appellate Counsel if Necessary.

PATTERSON, C.J.

54,048 Frank Whitten, Jr. v. State; Circuit, Benton; Reversed and Remanded for a New Trial.

54,596 Thomas M. Boutwell v. Randy Blacklidge, Alex Ware and Jones & Ware, Inc.; Circuit, Harrison; Affirmed.

THE COURT SITTING EN BANC:

53,017 Edward Earl Johnson v. State; Motion to Fix Day of Execution Sustained. Thursday, March 1, 1984, Set for Execution of the Death Penalty in the Manner Provided by Law.

53,754 Connie Ray Evans v. State; Circuit, Hinds; Petition for Rehearing on Application for Leave to File Petition for Writ of Error Coram Nobis Denied. Robertson, Hawkins and Prather, JJ., Dissent.

53,801 First Nat'l Bank of Vicksburg, Vicksburg, MS., and D. W. Ellis, Trustee v. Michael B. Caruthers and Rebecca R. Caruthers; Chancery, Warren; Petition for Rehearing Denied. Patterson, C.J., Broom, P.J., Roy Noble Lee, Prather and Robertson, JJ., Concur. Bowling, Hawkins and Dan Lee, JJ., Dissent.

53,825 Reserve Life Ins. Co. v. Henry McGee; Circuit, Rankin; Petition for Rehearing Denied. Broom, P.J. and Walker, P.J., Dissent.

53,916 In the Matter of the Last Will and Testament of Sarah Kennebrew, Dec'd: Laverne Webster, et al. v. Lee Kennebrew and Campbell Kennebrew; Chancery, Hinds; Petition for Rehearing Denied. Bowling and Dan Lee, JJ., Not Participating.

53,988 Allen R. Yates, M.D., et al. v. City of Jackson, Mississippi; Circuit, Hinds; Petition for Rehearing Denied.

54,000 Marion Albert Pruett v. Morris THigpen, Comm'r Miss. Dept. of Corrections, et al.; Circuit, Hinds; Petition for Rehearing Denied Subsequent to Denial of Leave to File a Petition for Writ of Error Coram Nobis on January 11, 1984.

54,205 Charley Newson v. Aaron E. Henry and Ruth Armstrong Ross, Executrix of Est. of L. A. Ross, Jr., Dec'd; Circuit, Coahoma; Petition for Rehearing Denied.

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 1, 1984

ROBERTSON, J.

Misc. #1656 Robert Lee Russell v. Warden, Miss. Dept. of Corrections and the State of Mississippi; Petition for Writ of Habeas Corpus Denied.

55,031 Alvin Culberson v. State; Circuit, Harrison; Amended Motion and Suggestion of Diminution Sustained.

BOWLING, J.

X 54,355 Robert W. Vaughn v. State Farm Mutual Automobile Ins. Co.; Circuit, Washington; Reversed and Remanded.

ROY NOBLE LEE, J.

X 54,723 William Thomas Smith v. State; Circuit, Pontotoc; Conviction of Five Counts of Armed Robbery and Sentences of Life Imprisonment, Sentences to Run Concurrently, Affirmed on Direct Appeal; Cross-Appeal Sustained as to Assignment IX.

54,725 Joseph Carl Brinson v. Betty Lee Brinson; Chancery, Rankin; Affirmed.

53,754 In Re: Connie Ray Evans v. State; Motion to Fix Day of Execution Sustained. Wednesday, February 15, 1984, Set for Execution of the Death Penalty in the Manner Provided by Law.

54,545 Martha H. McIlwain v. Cecil McIlwain; Motion for Award of Attorney's Fees and Costs Sustained in the Amount of $375.00 for Services in this Court.

54,921 Barbara Kaye Bush v. C. Nolon Bush; Motion to Strike Brief of Appellee Overruled. Appellee's Motion for Attorney's Fees Overruled.

55,127 Sarah Elizabeth Wilson v. Phillip E. Wilson; Motion to Strike Opinion and Final Decree Passed for Consideration of the Case on the Merits.

WALKER, P.J.

54,109 Judy Clara Carter Wooten, Karla Jeanne Wooten, By Her Mother and Next Friend, Judy Clara Carter Wooten, and Carl Edward Wooten, Jr., By His Mother and Next Friend, Judy Clara Carter Wooten v. Yazoo Valley Electric Power Ass'n; Circuit, Warren, Affirmed.

54,674 Willie James Stewart v. State; Circuit, Sunflower; Denial of Complaint against Eddie Lucas, et al. Affirmed.

PATTERSON, C.J.

53,945 Frank Gholar v. State; Circuit, Jefferson Davis; Petition for Leave to File Out-of-Time Petition for Rehearing and Motion to Recall Mandate and Record on Appeal Denied.

THE COURT SITTING EN BANC:

54,285 Bobby Caldwell v. State; Circuit, DeSoto; Petition for Rehearing Denied. Walker, P.J., Broom, P.J., Roy Noble Lee and Bowling, JJ., Concur. Patterson, C.J., Dan Lee, Prather and Robertson, JJ., Dissent. Hawkins, J., Not Participating.

§ 99–19–101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the state of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section,

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

SOURCES: Laws, 1977, ch. 458, § 2; 1983, ch. 429, § 2, eff from and after passage (approved March 29, 1983).

§ 99–19–105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99–19–101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

SOURCES: Laws, 1977, ch. 458, § 4, eff from and after passage (approved April 13, 1977).

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SEPTEMBER 1982 TERM

LEO E. EDWARDS — PETITIONER

VERSUS — NO. 53,298

STATE OF MISSISSIPPI — RESPONDENT

RESPONSE TO APPLICATION FOR LEAVE TO FILE A PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR WRIT OF HABEAS CORPUS

BILL ALLAIN, ATTORNEY GENERAL

BY: AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

AND

BY: WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LEO E. EDWARDS	PETITIONER
VERSUS	NO. 53,298
STATE OF MISSISSIPPI	RESPONDENT

RESPONSE TO APPLICATION FOR LEAVE
TO FILE A PETITION FOR WRIT OF
ERROR CORAM NOBIS AND/OR
WRIT OF HABEAS CORPUS

The time has come in light of certain events which have transpired within recent history for this Court to review its charted course in capital cases and to reconsider certain concepts which, according to recent Federal decision, place the State in an untenable position. The present petition is stereotypical of other cases which currently suggest the analysis voiced herein.

To set the State's position in proper perspective it is first necessary to elaborate upon the interaction of the State/Federal concept as viewed through the lens of 28 U.S.C. § 2254, habeas corpus of prisoners in State custody. These comments are significant in that they specifically deal with comity and how this Court by its actions and findings can bind the federal courts to a particular course of conduct and action.

I. BASIC PRINCIPLES UNDERLYING THE STATE/FEDERAL CONCEPT UNDER 28 U.S.C. § 2254

The well-spring of federal authority to intervene into state criminal proceedings is found at 28 U.S.C. § 2254. This authority to intervene is, however, not unfettered. Of course, federal habeas courts may only decide questions arising under the Constitution of the United States. Tollett v. Henderson,

411 U.S. 258, 36 L.Ed.2d 235, 93 S.Ct. 1602 (1973). Conversely, the federal courts lack authority to decide questions founded upon independent and adequate state substantive or procedural grounds. Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965).

In this context, let us examine the cornerstone upon which the State will erect its case.

A. State Court Determinations of Fact are Binding Upon the Federal Courts

28 U.S.C. § 2254(d) provides:

> "(d) In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -
>
> "(1) that the merits of the factual dispute were not resolved in the state court hearing;
>
> "(2) that the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> "(3) that the material facts were not adequately developed at the state court hearing;
>
> "(4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding;
>
> "(5) that the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;
>
> "(6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or

> "(7) that the applicant was otherwise denied due process of law in the state court proceeding;
>
> "(8) or unless that part of the record of the state court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> "And in an evidentiary hearing in the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the state court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous."

In Sumner v. Mata, 449 U.S. 539, 66 L.Ed.2d 722, 101 S.Ct. 764 (1981), the Supreme Court addressed the question of factual findings entered by State appellate courts. The Court held:

> It is obvious from a literal reading of the above that § 2254(d) is applicable to the present situation although it has been contended that this should not be the case where a state appellate court, as opposed to a trial court, makes the pertinent factual findings. We, however, refuse to read this limitation into § 2254(d). Admittedly, the California Court of Appeal made the factual determination at issue here and it did so after a review of the trial court record. Nevertheless, it clearly held a "hearing" within the meaning of § 2254(d). Both respondent and the state were formally before the court. Respondent was given an opportunity to be heard and his claim received plenary consideration even though he failed to raise it before the trial court. After respondent presented his case to the state

> appellate court, that court concluded in a written opinion that "the facts of the present case" did not adequately support respondent's claim. Since that court was requested to determine the issue by respondent, we do not think he may now be heard to assert that its proceeding was not a "hearing" within the meaning of § 2254(d).
>
> Section 2254(d) applies to cases in which a state court of competent jurisdiction has made "a determination after a hearing on the merits of a factual issue." It makes no distinction between the factual determination of a state trial court and those of a state appellate court. Nor does it specify any procedural requirements that must be satisfied for there to be a "hearing on the merits of a factual issue," other than the habeas applicant and the state or its agent be parties to the proceeding and that the state-court determination be evidenced by "a written finding, written opinion, or other reliable and adequate written indicia." Section 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trail court or an appellate court. Cf. Swenson v. Stidham, 409 U.S. 224, 230, 34 L.Ed.2d 431, 93 S.Ct. 359 (19720. This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts.
>
> Id., at 545-547, 66 L.Ed.2d at 730-731.

Continuing, the Court in Sumner I addressed the question of federal disagreement with state court findings:

> When it enacted the 1966 amendment to 28 U.S.C. § 2254 [28 U.S.C.S. § 2254], Congress specified that in the absence of the previously enumerated factors one through eight, the burden rests on the habeas petitioner, whose case by that time has run the entire gamut of a state judicial system, to establish "by convincing evidence that the factual determination of the state court was erroneous." 28 U.S.C. § 2254(d) [28 U.S.C.S. § 2254(d)]. Thus Congress meant to insure that a state finding not be overturned merely on the basis of the usual "preponderance of the evidence" standard in such a situation. In order to ensure that this mandate of Congress is enforced, we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the

> reasoning which led it to conclude that the state finding was "not fairly supported by the record." Such a statement tying the generalities of § 2254(d) to the particular facts of the case at hand will not, we think, unduly burden federal habeas courts even though it will prevent the use of the "boilerplate" language to which we have previously adverted. Moreover, such a statement will have the obvious value of enabling courts of appeals and this Court to satisfy themselves that the congressional mandate has been complied with. No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d). Cf. Greater Boston Television Corp. v. FCC, 143 U.S. App. DC 383, 444 F.2d 841, 851 (1970).
>
> Sumner I, supra, at 551-552, 66 L.Ed.2d at 733-734.

One would think the foregoing a rather clear and concise statement of law. On remand the Ninth Circuit apparently did not perceive it as such and without reciting any reason, entered findings that were once again at odds with those of the California Supreme Court. Once again on certiorari the United States Supreme Court reversed.

> We have again reviewed this case and conclude that the Court of Appeals apparently misunderstood the terms of our remand. Nor did it comply with the requirements of § 2254. We agree with the Court of Appeals that the ultimate question as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by § 2254. In deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion are governed by the statutory presumption as our earlier opinion made clear. Thus, whether the witnesses in this case had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others are all questions of fact as to which the statutory presumption applies.
>
> Of course, the federal courts are not necessarily bound by the state court's findings. Section 2254(d) permits a federal court to conclude, for example, that a state finding was "not fairly supported by the record." But the statute does

> require the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors listed in section 2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the fact findings made by the state courts. To adopt the Court of Appeals' view would be to deprive this statutory command of its important significance.
>
> Our remand directed the Court of Appeals to reexamine its findings in light of the statutory presumption. We pointed the way by identifying certain of its findings that we considered to be at odds with the findings of the California Court of Appeal. We asked the Court of Appeals to apply the statutory presumption or explain why the presumption was not applicable in view of the factors listed in the statute. The Court of Appeals did neither. Accordingly, we again must remand. Again we note that "we are not to be understood as agreeing or disagreeing with the majority of the Court of Appeals on the merits of the issue of impermissibly suggestive identification procedures." 449 U.S., at 552, 66 L.Ed.2d 722, 101 S.Ct. 764.
>
> Sumner II, 71 L.Ed.2d at 486-487.

See also: Gray v. Lucas, 677 F.2d 1086 (5 Cir. 1982) (Fifth Circuit decided two key issues involving intent and a confession based upon the binding determination of fact made by this Court under the mandate of Sumner I.)

Consequently, should this Court during the course of any proceeding, either on direct appeal or in a collateral proceeding, enter a factual finding or summary, then the federal courts are forever bound by such unless one of the eight exceptions noted in § 2254(d) is found.

B. State Prisoners are Required to Fairly Present the Substance of Their Claims to the Appropriate State Courts Before Entering the Federal Forum

Perhaps the second most significant concept in the field of post-conviction relief to come out of the United States Supreme Court in recent years is the doctrine of exhaustion of available

state remedies for all claims raised in a federal habeas petition. The first, in the opinion of the undersigned, is the means by which endless prisoner-litigation is quashed, namely the doctrine of procedural forfeiture as embodied in Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977).

In 1978 the United States Court of Appeals for the Fifth Circuit initiated the concept of total exhaustion. In Galtieri v. Wainwright, 582 F.2d 348, 355 (5 Cir. 1978) (en banc), the Court was confronted with a situation where, as in most habeas petitions, some of the claims had been raised on direct appeal but one in particular had not. In requiring dismissal without prejudice, the Court held:

> The policy in this circuit is that a federal district court must dismiss without prejudice a "mixed" petition for a writ of habeas corpus filed by a state prisoner. West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973), aff'd regarding exhaustion en banc, 510 F.2d 363 (5th Cir. 1975). A "mixed" petition is one that asserts both exhausted claims and unexhausted claims that do not fit an exception to the exhaustion doctrine; that is, some of the claims have not been presented to the state court system so that the custodial state has not yet had an opportunity to correct all of the alleged constitutional errors.

In Rose v. Lundy, ____ U.S. ____, 71 L.Ed.2d 379, 102 S.Ct. ____ (1982), this rule was applied nationally. Expounding upon the policy consideration underpinning the rule of total exhaustion the Court held:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-491, 35 L.Ed.2d 443, 93 S.Ct. 1123 (1973). Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." Ex parte Royall, supra, at 251, 29 L.Ed. 868, 6 S.Ct. 734. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply

> the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 94 L.Ed. 761, 70 S.Ct. 587 (1950). See Duckworth v. Serrano, 454 U.S. ____, 70 L.Ed.2d 1, 102 S.Ct. 18 (1981) (per curiam) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").
>
> A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. See Braden v. 30th Judicial Circuit Court of Kentucky, supra, at 490, 35 L.Ed.2d 443, 93 S.Ct. 1123. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review. Cf. 28 U.S.C. § 2254 (d) [28 U.S.C.S. § 2254(d)] (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).
>
> ____ U.S. ____, 71 L.Ed.2d 387-388.

In this same context, and of particular importance in the consideration of the matter sub judice, is the situation, as is so often found, where the prisoner raises questions of state law on direct appeal and then in a post-conviction petition recasts his arguments in constitutional terms to gain the keys to the federal courthouse. This situation was addressed in the landmark case of Picard v. Conner, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971).

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," Ex parte Royall, supra, at 251, 29 L.Ed. at 871, it is not sufficient merely that the federal habeas applicant has been through

> the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v. Burford, supra, at 203, 94 L.Ed. at 766; David v. Burke, 179 U.S. 399, 401-403, 45 L.Ed. 249, 250, 251, 21 S.Ct. 210 (1900).
>
> Respondent challenged the validity of his indictment at every stage of the proceedings in the Massachusetts courts. As the Court of Appeals pointed out, 434 F.2d, at 674, this is not a case in which factual allegations were made to the federal courts that were not before the state courts, see, e.g., United States ex rel. Boodie v. Herold, 349 F.2d 372 (CA2 1965); Schiers v. California, 333 F.2d 173 (CA9 1964), nor a case in which an intervening change in federal law cast the legal issue in a fundamentally different light, see, e.g., Blair v. California, 340 F.2d 741 (CA9 1965); Pennsylvania ex rel. Raymond v. Rundle, 339 F.2d 598 (CA3 1964). We therefore put aside consideration of those types of cases. The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not.
>
> Until he reached this Court, respondent never contended that the method by which he was brought to trial denied his equal protection of the laws. Rather, from the outset respondent consistently argued that he had been improperly indicted under Massachusetts law and to the extent he raised a federal constitutional claim at all, that the indictment procedure employed in his case could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the states. He adverted to the Fourteenth Amendment solely as it bore upon that submission. The equal protection issue entered this case only because the Court of Appeals injected it.

Recently, the nation's highest court elaborated upon the principles formulated in Picard. Its comments in Anderson v. Harless, ____ U.S. ____, ____, 74 L.Ed.2d 3, 6-8 (1982), are of significant import to the topic now under consideration.

The United States Court of Appeals for the Sixth Circuit affirmed. Harless v. Anderson, 664 F.2d 610 (1982). The court held that respondent's claim had been properly exhausted in the state courts, because respondent had presented to the Michigan Court of Appeals the facts on which he based his federal claim and had argued that the malice instruction was "reversible error." See People v. Harless, 78 Mich. App., at 748, 261 N.W.2d, at 43. The court also emphasized that respondent, in his brief to the Michigan Court of Appeals, had cited People v. Martin, 392 Mich. 553, 221 N.W. 2d 336 (1974) - a decision predicated solely on state law in which no federal issues were decided, but in which the defendant had argued broadly that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments. In the view of the United States Court of Appeals, respondent's assertion before the Michigan Court of Appeals that the trial court's malice instruction was erroneous, coupled with his citation of People v. Martin, supra, provided the Michigan courts with sufficient opportunity to consider the issue encompassed by respondent's subsequent federal habeas petition.

We reverse. In Picard v. Connor, 404 U.S. 270 (1971), we made clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. Id., at 276-277. It is not enough that all the facts necessary to support the federal claim were before the state courts, id., at 277, or that a somewhat similar state-law claim was made. See, e.g., Gayle v. LeFevre, 613 F.2d 21 (CA2 1980); Paullet v. Howard, 634 F.2d 117, 119-120 (CA3 1980); Wilks v. Israel, 627 F.2d 32, 37-38 (CA7), cert. denied, 449 U.S. 1086 (1980); Connor v. Auger, 595 F.2d 407, 413 (CA8), cert. denied, 444 U.S. 851 (1979). In addition, the habeas petitioner must have "fairly presented" to the state courts the "substance" of his federal habeas corpus claim. Picard, supra, at 275, 277-278. See also Rose v. Lundy, ____ U.S. ____, ____ (1982).

In this case respondent argued on appeal that the trial court's instruction on the element of malice was "erroneous." He offered no support for this conclusion other than a citation to, and three excerpts from, People v. Martin, supra - a case which held that, under Michigan law, malice should not be implied from the fact that a weapon is used. See Petn for Cert 47a-49a, 51a-53a. Not surprisingly, the Michigan Court of Appeals interpreted respondent's claim as being predicated on the state-law rule of Martin, and analyzed it accordingly. 78 Mich. App., at 748-750, 261 N.W.2d, at 43.

> The United States Court of Appeals concluded that "the due process ramifications" of respondent's argument to the Michigan court "were self-evident," and that respondent's "reliance on Martin was sufficient to present the state courts with the substance of his due process challenge to the malice instruction for habeas exhaustion purposes." 664 F.2d, at 612. We disagree. The District Court based its grant of habeas relief in this case on the doctrine that certain sorts of "mandatory presumptions" may undermine the prosecution's burden to prove guilt beyond a reasonable doubt and thus deprive a criminal defendant of due process. See Sandstrom, supra; In re Winship, 397 U.S. 358 (1970). The Court of Appeals affirmed on the same rationale. However, it is plain from the record that this constitutional argument was never presented to, or considered by, the Michigan courts. Nor is this claim even the same as the constitutional claim advanced in Martin - the defendant there asserted a broad federal due process right to jury instructions that "properly explain" state law, 392 Mich., at 558, 221 N.W.2d, at 339, and did not rely on the more particular analysis developed in cases such as Sandstrom, supra.

Therefore, when one considers the position of the federal judiciary on questions of this nature, the principles of res judicata noted in Miss. Code Anno. § 99-35-145 (1972), Auman v. State, 285 So.2d 146 (Miss. 1973), Wetzel v. State, 225 Miss. 450, 76 So.2d 194 (1955), and Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979), come sharply into focus. Such epitomizes the symbiotic relationship between the concepts of total exhaustion and the Wainwright v. Sykes doctrine of procedural forfeiture.

Recognizing this symbiotic relationship, the Supreme Court in the case of Engle v. Isaac, ____ U.S. ____, ____ n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982), obviated the necessity of a return to the state courts where the question would be procedurally barred. The Court stated:

> As we recognized in Sykes, 433 U.S. at 78-79, 97 S.Ct. at 2502, the problem of waiver is separate from the question of whether a state prisoner has exhausted state remedies. Section 2254(b) requires habeas applicants to exhaust those

> remedies "available in the courts of the state." This requirement, however, refers only to remedies still available at the time of the federal petition. See: Humphrey v. Cade, 405 U.S. 504, 516, 92 S.Ct. 1048, 1055, 31 L.Ed.2d 394 (1972); Fay v. Noia, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963). Respondents, of course, long ago completed their direct appeals. Ohio, moreover, provides only limited collateral review of convictions; prisoners may not raise claims that could have been litigated before judgment or on direct appeal. See: Ohio Rev. Code. Ann. § 2953.21(a) (1975 ; Collins v. Perini, 594 F.2d 592 (CA6 1979); Keener v. Ridenour, 594 F.2d 581 (CA6 1979). Since respondents could have challenged the constitutionality of Ohio's traditional self-defense instruction at trial or on direct appeal, we agree with the lower courts that state collateral relief is unavailable to respondents and, therefore, that they have exhausted their state remedies with respect to this claim.

Stated simply, there is no need for a federal court to require a state prisoner to return to the state courts when his claim would be procedurally barred.

The importance of a clear and unequivocal rule regarding post-conviction presentation of new grounds for relief is obvious. Let us consider the federal rules regarding such.

C. Bar to Federal Review

Without question, the law is now crystal clear that a federal court is barred from considering claims on habeas review which rest on an adequate foundation of state substantive or procedural law. Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965); Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973); Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 (1976); Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977); Engle v. Isaac, ____ U.S. ____, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982); United States v. Frady, ____ U.S. ____, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982).

Specifically, if a state prisoner is required by state law to raise a timely challenge to a particular point or proceeding

and fails to do so he is barred from raising the claim in a federal habeas proceeding absent a showing of "cause" and "actual prejudice". Francis v. Henderson, supra; Wainwright v. Sykes, supra. This failure to timely raise a challenge has been variously referred to as waiver, Wainwright v. Sykes, supra, default, Engle v. Isaac, supra, or forfeiture, Evans v. Maggio, 557 F.2d 430 (5 Cir. 1977); Forman v. Smith, 633 F.2d 634 (2 Cir. 1980).

Waiver as noted in Sykes is qualitatively different from the waiver discussed in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Confronting this distinction for the first time in Forman v. Smith, 633 F.2d 634, 638 (5 Cir. 1980), the Fifth Circuit held:

> This Court has not previously determined whether the standards of Fay v. Noia, supra, or Wainwright v. Sykes, supra, govern the availability in a habeas corpus challenge of a constitutional claim not raised on direct appeal from a state court conviction. The issue was noted in Gale v. Harris, 580 F.2d 52, 53, n. 1 (2d Cir. 1978), cert. denied, 440 U.S. 965, 99 S.Ct. 1515, 59 L.Ed.2d 781 (1979), but its resolution was not necessary for decision of that case. This appeal poses the issue directly because there was no deliberate by-pass and hence petitioner's constitutional claim would be available under Noia but, as will appear, we conclude that his claim is not available under Sykes.
>
> Both Noia and Sykes cast the issue in terms of waiver, but it is apparent that the two decisions assign different meanings to that concept. Noia uses the traditional test for determining waiver of a constitutional right, whether there has been "an intentional relinquishment or abandonment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), for determining whether a deliberate by-pass of an available state court remedy has occurred. 372 U.S. at 439, 83 S.Ct. at 849. Sykes shifts the inquiry away from an examination of the petitioner's knowledge and intention concerning assertion of his claim, and instead focuses on whether he in fact had a justifiable reason for not asserting his claim. In the absence of such a reason, the claim is deemed to be forfeited, regardless of whether the petitioner, or his counsel

> acting for him, consciously intended to waive a claim known to exist. Even if a justifiable reason exists, Sykes also deems the claim to be forfeited unless the petitioner can show that the failure to assert it caused his "actual prejudice". 433 U.S. at 91, 97 S.Ct. at 2508. We think the integrity of the term "waiver" will be better maintained in this context if it is used, as in Noia, to mean intentional relinquishment of a known right, and if the term "forfeiture" is used to describe what occurred in Sykes, where legal consequences were attached to a petitioner's omission. See: Indiciglio v. United States, 612 F.2d 624, 630, n. 11 (2d Cir. 1979), cert. denied, 445 U.S. 933, 100 S.Ct. 1326, 63 L.Ed.2d 768 (1980); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U.Pa.L.Rev. 473 (1978); Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich.L.Rev. 1214 (1977).

A precise definition of "cause" has never been formulated, Wainwright v. Sykes, supra, and the courts have apparently been satisfied to approach the problem on an ad hoc basis. Engle v. Isaac, supra. One point is certain, however, the cause standard cannot be satisfied by the contention that the objection would have been futile. Engle v. Isaac, supra; Wainwright v. Henry, ____ U.S. ____, 50 U.S.L.W. 3981 (1982), reversing Henry v. Wainwright, 661 F.2d 56 (5 Cir. 1981).

Similarly, prisoners will not be heard to complain of particular errors where a proper challenge was not laid where there existed some foundation in law for an objection at the time. Engle v. Isaac, supra; Arnold v. Wainwright, supra. As the Court held in Engle, supra, 102 S.Ct. at 1573, "later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair." The unencouraging status of the law at the time of the trial is not cause sufficient to excuse an otherwise lawful and final state procedural waiver. Dumont v. Estelle, 513 F.2d 793 (5 Cir. 1975).

In this same vein, claims of ineffective assistance of counsel do not constitute cause. In Lumpkin v. Ricketts, 551 F.2d 680 (5 Cir. 1977), the Fifth Circuit held:

> This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard.
>
> Id., at 683.

See also: Washington v. Estelle, 648 F.2d 276 (5 Cir. 1981); Cooper v. Fitzharris, 586 F.2d 1325 (9 Cir. 1978) (en banc); Indiviglio v. United States, 612 F.2d 624 (2 Cir. 1979); Tyler v. Phelps, 643 F.2d 1095 (1981) (wherein on petition for rehearing the panel declined to hold, as it originally had, that an allegation of ineffective assistance of counsel, though not in the nature of a Sixth Amendment violation, might satisfy "cause".)

Likewise, the courts have not rendered a precise definition of prejudice, Wainwright v. Sykes, supra; Engle v. Isaac, supra, but have been adamant in the contention that there must be a "strong showing of actual prejudice." Dumont v. Estelle, 513 F.2d 793, 797 (5 Cir. 1975); Wainwright v. Sykes, supra; Engle v. Isaac, supra; Henderson v. Kibbe, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977); Sparkman v. Estelle, 672 F.2d 559 (5 Cir. 1982).

In Henderson v. Kibbe, supra, the Court defined prejudice in the giving of erroneous jury instruction as:

> The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S. at 147, 38 L.Ed.2d 368, 94 S.Ct. 396, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id., at 146, 38 L.Ed.2d 368, 94 S.Ct. 396, 431 U.S. at 154, 52 L.Ed.2d at 212, 97 S.Ct. 1730.

In Sparkman v. Estelle, supra, at 562, the Court set the standard for an erroneous evidentiary admission as:

> Finally, even if admission of Botley's testimony was error, petitioner would not be entitled to federal habeas relief unless the evidence so infected the trial as to deny fundamental fairness. The testimony must have been "'material in the sense of a crucial, critical, highly significant factor'" to justify habeas relief. (Citations omitted).

Irrespective of the label adopted, the meaning is the same. If a prisoner is required to raise a timely challenge or perform a certain act and fails to do so he is barred from raising such in a federal habeas proceeding absent a showing of "cause" and "actual prejudice".

The concept of waiver does not mean a state court may not comment on the state of a particular area of the law on its own. As an added note for practical application purposes, in Ratcliff v. Estelle, 597 F.2d 474 (5 Cir. 1979), the Court addressed the issue of alternative rulings on a particular point; i.e., a ruling invoking the procedural bar then for the benefit of the bench and bar elaborating on the merits.

> In the instant case, there is no doubt that the procedural default rule was applied in state court. The state trial court squarely held that petitioner had failed to make a timely objection to the grand jury array. It then went on do discuss the merits, apparently with a view to disposing of all issues in the event it was in error on the procedural point. Without written order the Texas Court of Criminal Appeals denied petitioner's application based on the findings of the trial court.
>
> It is fair to assume that the appellate court applied the procedural default rule. First, the language in the trial court opinion regarding procedural default is absolute and there is no subsequent language which would qualify or compromise it. Second it is well settled that a court will not reach a constitutional question if it can rest its decision on nonconstitutional grounds. See Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947). See generally Nowak, Rotunda & Young, Constitutional Law 83-85 (1978).

> Third, there is no question that the trial court correctly applied Texas law on the procedural issue.
>
> Id., at 478.

What does become vitally important, however, is that the state court clearly and specifically invoke the procedural bar prior to its substantive comments.

D. State Procedural Rules That Bar Review Herein

Like the Federal courts the Mississippi courts will not recognize errors or objections unless a timely challenge is raised. United States v. Sanders, 639 F.2d 268 (5 Cir. 1981); United States v. Miller, 600 F.2d 498 (5 Cir. 1979); Parker v. State, 367 So.2d 456 (Miss. 1976); Martin v. State, 354 So.2d 1114 (Miss. 1978); Stringer v. State, 279 So.2d 156 (Miss. 1973). Like its federal counterparts, Rules 30 and 52, [1] Fed. R. Crim. P., the state practice is based upon specified rules of procedure.

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[1] Rule 30: Instructions

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are complete. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
>
> * * *
>
> Rule 52: Harmless Error and Plain Error
>
> (a) Harmless Error: Any error, defect, irregularity or variance which does not effect substantial rights shall be disregarded.
>
> (b) Plain Error: Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 6, Miss. Sup. Ct. Rules, provides:

> Assignments of Error
>
> (a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (2). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.
>
> (b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Likewise, Rule 11, Miss. Sup. Ct. Rules, states:

> No Reversal for Harmless Error
>
> No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

In specific reference to jury instructions, this Court has provided in Rule 42, Miss. Sup. Ct. Rules, the following:

> Instructions
>
> The judges of the circuit courts of Mississippi have adopted uniform rules of procedure for the circuit courts, and among those rules adopted is Rule 14 requiring attorneys to file jury instructions with the circuit clerk and to deliver copies of the instructions proposed to be given the jury to opposing counsel before the trial. The rule further provides that attorneys are required to dictate their specific objections to an instruction offered, thus giving the trial judge an opportunity to pass upon the objections before the case is argued before the jury.
>
> After considering the foregoing rule, we are convinced that it will aid in promoting better judicial procedure and should be implemented by this Court. It is,

> therefore, the rule of this Court that no assignment of error based on the giving of an instruction to the jury will be considered on appeal unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such objection. However, in extreme cases this Court may raise an objection to a jury instruction in order to prevent manifest injustice.

Supplementing this rule, this Court held in Newell v. State, 308 So.2d 71, 78 (Miss. 1975) that a "trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so." Succinctly stated, contemporaneous objection is necessary to preserve a point on appeal. Pittman v. State, 297 So.2d 888 (Miss. 1974); Myers v. State, 268 So.2d 353 (Miss. 1972).

As previously mentioned, like Ohio in Engle, Mississippi provides only limited collateral review of convictions. In re Broom's Petition, 251 Miss. 25, 168 So.2d 44 (1964). In post-conviction context prisoners may not raise claims that could have been litigated before judgment or on direct appeal, Holloway v. State, 261 So.2d 799 (Miss. 1972), nor may they raise claims which have been heretofore litigated. Auman v. State, 285 So.2d 146 (Miss. 1973); Wetzel v. State, 225 Miss. 450, 76 So.2d 194 (1955); Miss. Code Anno. § 99-35-145(9); Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979). Additionally, a prisoner must use diligence in the presentation of his petition and delayed, successive, or dilatory petitions are barred. Wetzel v. State, supra; In re Broom's Petition, supra; Holloway v. State, supra; Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979).

The procedure for filing a post-conviction collateral petition in Mississippi is set forth in § 99-35-145, Mississippi Code of 1972, Annotated and Amended; Rule 8.07, Miss. Unif. Crim. R. Cir. Ct. Prac. (1979); and Rule 38, Miss. Sup. Ct. Rules. In situations like the matter sub judice where an appeal was taken to the Mississippi Supreme Court, the prisoner must file an

application with the Court for leave to file a petition for a writ in the court of original jurisdiction. Once the pleading requirements are met, the Court will then examine the case to determine whether a case for relief or probable cause can be made out. Wheeler v. State, 219 Miss. 129, 70 So.2d 82 (1954); Thornhill v. State, 246 Miss. 312, 149 So.2d 27 (1963); Fondren v. State, 187 So.2d 327 (Miss. 1966). In ascertaining whether a claim for relief can be made the court will consider the application, petition, briefs, affidavits, and all previous proceedings involving the same matter which had been filed with the court. Yates v. State, 189 So.2d 917 (Miss. 1966); Wheeler v. State, supra.

E. Are We Going to Stay the Charted Course or Are We Going to Crash Upon the Rocky Shores of the Federal Judiciary?

Within the past few months no less than the United States Supreme Court and the Court of Appeals for the Fifth Circuit have questioned the rules discussed in the preceding section.

In the case of Hathorn v. Lovorn, ____ U.S. ____, ____, 72 L.Ed.2d 824, 832-834, 102 S.Ct. ____ (1982), the Supreme Court seriously questioned this Court's application of its own rules. Should this carry over into the field of criminal law, as apparently it has, Bell v. Watkins, 692 F.2d 999 (5 Cir. 1982), the State seriously doubts, as will be fully discussed infra, whether it will ever be able to sustain a conviction. In particular, the Supreme Court held the following in Hathorn:

> Respondents also argue that the Mississippi Supreme Court pretermitted consideration of the Voting Rights Act because petitioners' reliance upon the issue in a petition for rehearing was untimely. We have recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question. Our decisions, however, stress that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149, 12 L.Ed.

2d 766, 83 S.Ct. 1734 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims. Even if we construe the Mississippi Supreme Court's denial of petitioners' petition for rehearing as the silent application of a procedural bar, we cannot conclude that the state court consistently relies upon this rule.

Respondents cite two cases indicating that the Mississippi Supreme Court will consider an issue raised for the first time in a petition for rehearing "[o]nly in exceptional cases." New & Hughes Drilling Co. v. Smith, 219 So.2d 657, 661 (Miss. 1969); Rigdon v. General Box Co., 249 Miss. 239, 246, 152 So.2d 863, 864 (1964). Although these opinions may summarize the court's practice prior to 1969, we have been unable to find any more recent decisions repeating or applying the rule. On the contrary, the Mississippi Supreme Court now regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions.

One particular decision by the Mississippi Supreme Court, decided only last year, demonstrates that the court does not consistently preclude consideration of issues raised for the first time on rehearing. In Quinn v. Branning, 404 So.2d 1018 (1981), the court held that part of a criminal statute violated the state constitution's prohibition against local legislation. Striking the offensive language, the court approved the rest of the statute and affirmed the underlying conviction. The defendant then petitioned for rehearing, pointing out that the affidavit against him did not allege a crime under the reformed statute. The court agreed with this contention, granted the petition in part, and reversed the conviction, all without mentioning the rule against consideration of new issues on rehearing. The striking similarity between Quinn and this case, both involving issues that the parties could have foreseen but that arose with urgency only after the court upheld part of a challenged statute, persuades us that the Mississippi Supreme Court is not "strictly or regularly" following a procedural rule precluding review of issues raised for the first time in a petition for rehearing. The denial of rehearing in this case, although not appearing sufficiently final to permit our immediate review, must have rested either upon a substantive rejection of petitoner's federal claim or upon a procedural rule that the state court applies only irregularly. Thus, there are no independent and adequate state grounds barring our review of the federal issue.

Within the realm of capital cases, this Court continues to move dangerously near a federal recognition of functional abdication of procedural rules similar to that attributed the court in Hathorn. In Irving v. State, 361 So.2d 1360, 1363 (Miss. 1978), this Court held:

> We recognize that thoroughness and intensity of review are heightened in cases where the death penalty has been imposed. Augustine v. State, 201 Miss. 731, 29 So.2d 454 (1947). What may be harmless error in a case with less at stake becomes reversible error when the penalty is death. Forrest v. State, 335 So.2d 900 (Miss. 1976); Russell v. State, 185 Miss. 464, 189 So. 90 (1939). Therefore, we have given careful scrutiny to the proceedings in the trial below in order to determine whether accused received a fair trial and without necessary regard to whether technical basis for preserving error was made by counsel.

This rule has since been followed in Culberson v. State, 379 So.2d 499, 506 (Miss. 1979) and Laney v. State, (Miss. Sup. Ct. No. 53,690, Oct. 13, 1982, not yet published). As a result, it is no doubt that the Fifth Circuit recently ruled in Bell v. Watkins, supra, that Rule 42, Miss. Sup. Ct. Rules, does not apply in death penalty cases.

In line with this doctrine of enhanced review, this Court has in the past considered with few exceptions all claims, either on direct appeal or in a post-conviction petition, presented to it. See: Bell v. Watkins, 381 So.2d 118 (Miss. 1980); In re Jordan, 390 So.2d 584 (Miss. 1980). Otherwise, the Court has simply overruled the motion without an opinion. A representative ruling in the no opinion cases may be found in Bullock v. State, Miss. Sup. Ct. No. 51,937 (unpublished order dated Oct. 7, 1981):

> The Court, sitting en banc, has considered the grounds stated in the application of appellant for leave to file a petition for writ of error coram nobis, including the contention that appeallant was denied effective assistance of counsel in the trial below, and finds that the application lacks merit and should be denied.

> It is therefore ordered that the application for leave to file a petition for writ of error coram nobis be and the same is hereby denied.

Neither course, insofar as death penalty cases are concerned, has rendered satisfactory results.

Pointedly, every case, reaching a federal forum with the exception of Gray v. Lucas, 677 F.2d 1086, on panel rehearing, 685 F.2d 139 (5 Cir. 1982), decided by this Court involving the infliction of the death penalty, has been reversed by the federal courts on grounds raised for the first time in a post-conviction petition. See: Washington v. Watkins, 655 F.2d 1346 (5 Cir. 1981); Jordan v. Watkins, 681 F.2d 1067 (5 Cir. 1982); Bell v. Watkins, supra; Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980); Irving v. Hargett, 518 F.Supp. 1127 (N.D. Miss. 1981). Obviously, a continued course along this line will mark a further erosion of the sanctity and finality of this Court's rulings. However, the power to halt this trend and recoup control of its decisions rests with this Court and waits but to be firmly seized.

Should this Court continue to enforce the "no holds barred" concept embodied in the Irving - Culberson - Laney line of cases we can fully expect the Courts to expand upon the ruling in Hathorn v. Lovorn. Similarly, the Court's comments in Bell v. Watkins, supra, at 1006, demonstrate the dangerous effect of the form used by this Court in denying relief without opinion.

> Once again the State maintains that we may not reach this issue because the defendant failed to raise it in state court. Engle v. Isaac, ____ U.S. ____, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). When the State originally presented this argument to the district court, the court sent the defendant back to the state courts to exhaust his state remedies. In denying the defendant's Motion for Leave to File a Petition for Writ of Error Coram Nobis and/or Writ of Habeas Corpus, the Mississippi Supreme Court did not discuss the Witherspoon

> issue specifically. It stated only that "[t]he Court . . . has carefully and meticulously considered each objection of the petitioner's complaint" and is "of the opinion that the petitioner . . . received a fair trial by the jury of his peers in conformity with the . . . Constitution of our United States." Bell v. Watkins, 381 So.2d 118, 119 (Miss. 1980). This language suggests that the court considered the merits of the issues raised. Even if it does not, failure to state whether a writ of coram nobis was denied on the merits or for procedural default creates a presumption that it was considered on the merits and does not bar federal habeas review. Miller v. Estelle, 677 F.2d 1080 (5th Cir. 1982); Thomas v. Blackburn, 623 F.2d 383 (5th Cir. 1980), cert. denied, 450 U.S. 953, 101 S.Ct. 1413, 67 L.Ed.2d 380 (1981).

What does all this mean?

Reduced to its simplest terms, if this Court continues its current course, it will ultimately abdicate its position as the Supreme Court of the State of Mississippi and vest that authority in the United States Court of Appeals for the Fifth Circuit as far as criminal cases are concerned, thereby rendering itself merely an intermediate court answerable to a United States Magistrate. Predicably, if this Court follows in this same direction, the federal courts will take the ruling in Hathorn v. Lovorn a step further and ignore this Court's specific invocation of a procedural bar. As far as the practical application of this concept is concerned, defense counsel can simply sit back, do nothing, and on appeal or in a post-conviction petition raise any and all claims he desires irrespective of whether they are in the record.

Is this what we want? Is this the course this Court wants to follow? To put it in terms of a local colloquialism, "It is time to fish or cut bait."

What then is the suggested course of action?

Stripped of all rhetoric, the State simply urges this Court to issue a strong statement to the federal judiciary that it will enforce its own rules of procedure and strictly adhere to them.

The rulings in Hathorn and Bell are based upon interpretations of State law. As the highest court in the State of Mississippi, this Court and this Court alone has the authority to rectify the problems created by these two cases.

The comments of the Fifth Circuit in the recent case of Henry v. Wainwright, 686 F.2d 311 (5 Cir. 1982), are instructive:

> Whether Henry's constitutional claim may be dealt with on the merits on federal habeas review thus depends upon how the state appeals courts dealt with the issue. If Florida dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal habeas court must also determine the merits of the claim. Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 106 (1975); Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979). If the state courts found the issue barred because of procedural default, then federal habeas review is precluded absent a showing of cause and prejudice. Isaac, ___ U.S. at ___, 102 S.Ct. at 1572; Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).
>
> * * *
>
> Even if there were a procedural default at trial in that counsel did not belabor the point by objecting to the jury instruction, we find that the state courts must have excused the default in order to reach the merits. This would have been consistent with established state law; in death cases, the Florida Supreme Court exercises a special scope of review enabling them to excuse procedural defaults. Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977) ("Admittedly the testimony . . . was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by this court in death cases."). In the situation presented here, where the state court's opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits.
>
> Id., at 313-314.

Continuing, in footnote 4 the Court stated:

> Otherwise, federal habeas review would unjustly be denied a prisoner who has no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the

> comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedural barred.
>
> The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default in another case allows a federal court to excuse a default in a case where the state courts have not. Instead, we have looked to Florida law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979). [emphasis added]
>
> Id., at 314 n.4.

From the most recent pronouncements on the subject, the proper course the Court should follow is reasonably apparent. While the practice of this Court as embodied in the comments in Irving, Culberson and Laney to give death penalty cases the highest scrutiny is laudatory in nature, the result is proving disastrous to our jurisprudence. Our system of justice, nationally speaking, is becoming a farce and mockery due to the unending litigation of a criminal conviction. Society demands finality; otherwise, we have nothing but judicial anarchy.

The State does not suggest that a criminal defendant should not have his bite of the apple. However, the State strenuously objects to the continual litany of claims that could and should have been raised at the trial level and on direct appeal but were the first time in a petition for writ of error coram nobis. This does nothing but encourage sloppy, slipshod trial procedure and sandbagging. Similarly, the State has no objection to the Court elaborating upon the merits of a matter for the benefit of the bench and bar once the proposition is clearly barred as explained in Ratcliff v. Estelle, supra. Such would be both helpful and instructive in future cases.

The State seeks but one simple step from this Court - the enforcement of its own rules. With that in mind, we turn to the specific case at hand.

II. STATEMENT OF THE CASE

The genesis of this application is the capital murder of one Lindsey Don Dixon, effected on June 14, 1980, during an armed robbery of the Jackson, Mississippi, convenience store in which Dixon worked. Petitioner was indicted for the crime in August, 1980, tried and found guilty in March, 1981, and sentenced to death. Pursuant to Miss. Code Anno. § 99-19-105(1) (Supp. 1982), automatic appellate review was undertaken by this Honorable Court.

In that direct appeal, petitioner urged existence of some eight errors of reversible magnitude, including claims of:

> (1) Improper exclusion of jurors for conscientious opposition to the death penalty;
>
> (2) Failure to adequately instruct the jury on the weight of circumstantial evidence;
>
> (3) Improper admission of evidence of other crimes;
>
> (4) Erroneous refusal to reduce the charge to simple murder;
>
> (5) Admission of prejudicial photographs;
>
> (6) Insufficiency of the evidence;
>
> (7) Abuse of prosecutorial discretion; and,
>
> (8) Claim of ineffective assistance of counsel due to improper closing argument by the State.

Following oral argument en banc, this Court, on April 14, 1982, affirmed petitioner's conviction and sentence, setting June 2, 1982, as date of execution. In the written opinion in affirmance, the Court addressed expressly all the suggested grounds for reversal, concluding each to be without merit. Edwards v. State, 413 So.2d 1007 (Miss. 1982). Subsequently, petition for rehearing was summarily denied on May 26, 1982.

Shortly thereafter, on May 28, 1982, a stay of execution was granted pending filing of a petition to the United States Supreme Court for a Writ of Certiorari. Represented by new counsel acting on behalf of the NAACP Legal Defense Fund, Inc., petitioner was denied a writ of certiorari by the United States Supreme Court on October 12, 1982, and on motion of the State to this Court, by Order of November 19, 1982, execution was rescheduled for December 29, 1982. Following denial of a stay of execution pending filing of an application for petition of error coram nobis on December 21, 1982, petitioner filed a petition for writ of error coram nobis and on December 28, 1982, received a stay of execution pending consideration thereof. The amended petition, filed before this Court on January 7, 1983, forms the issues to which the present response is addressed.

III. RESPONSE TO GROUNDS FOR RELIEF

In his petition for leave to file a petition for writ of error coram nobis and/or writ of habeas corpus Edwards raises the following grounds:

1. The exclusion for cause of veniremen who expressed personal scruples against capital punishment but declared that they could fairly consider the death penalty deprived petitioner of an impartial jury in violation of his Sixth and Fourteenth Amendment Rights.

2. The petitioner was denied his constitutional right to trial by an impartial jury when only death - qualified jurors were seated to determine guilt or innocence. The death - qualifying voir dire was conducted in the presence of the entire array, and the State exercised hits peremptory challenges to strike blacks and those with any scruples about the death penalty.

3. The prosecution's introduction of hearsay testimony of a separate and distinct crime, in violation of the Court's in limine Order, deprived the petitioner of a fundamentally fair trial in violation of his Fourteenth Amendment Right to Due Process of law.

4. The prosecutor's repeated inflammatory and prejudicial remarks during final closing argument in the penalty phase, deprived petitioner of a fundamentally fair determination of whether he should live or die in violation of his Eighth and Fourteenth Amendment rights.

5. The Mississippi death penalty statute is disproportionate, arbitrary and unconstitutional because felony murder committed without any design to effect death is punishable by the death penalty, whereas premeditated and deliberate murder is punishable only be life in prison.

6. By presenting prejudicial nonstatutory aggravating circumstances to the sentencing jury, the state interjected arbitrary and capricious factos into the decision whether petitioner should live or die, in violation of Miss. Code Anno. § 99-19-101 and of the Eighth and Fourteenth Amendments to the United States Constitution.

7. By permitting the jury to find as aggravating circumstances that petitioner committed the felony-murder "for pecuniary gain" and while "engaged in the commission of robbery," and by permitting the jury to shift the burden of proof from the prosecution to the defense, the trial court violated petitioner's rights under the Eighth and Fourteenth Amendments to the Constitution.

All of the foregoing grounds are procedurally barred. As for ground 5, the State, as elaborated upon hereafter, would have the Court invoke the procedural bar then for the benefit of the bench and bar elaborate upon the requirements of the recent case of Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), as is permissible under Ratcliff v. Estelle, supra.

PROPOSITION (1)

Petitioner questions the exclusion of two veniremen, Hopkins and Hibler, for cause solely because they expressed reservations about the death penalty.

On direct appeal petitioner in his first assignment of error raised the following question:

Point One: The exclusion of Juror Hibler on Ground of Conscientious Opposition to the Imposition of the Death Penalty Violates Appellant's Rights Under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In affirming the conviction and sentence Justice Broom, speaking for the Court held:

> Upon this state of juror Hibler's vior dire examination, she was excused and the defendant urges reversible error under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Having categorically stated that she couldn't follow the testimony and instructions of the court, we think that the juror was correctly excluded. The fact that upon questioning by defense counsel, Hibler stated she would try to be a "fair" juror did not qualify her in this case. Similar argument was made in Edwards v. State, supra, n. 1, but there the sentence was life imprisonment whereas here the sentence is death. Thus, the two cases are not precisely analogous. For an excellent explanation of the proper method of bringing the death penalty to the attention of the special venire in capital cases, see Armstrong v. State, 214 So.2d 589 (Miss. 1968).

Petitioner now apparently seeks to relitigate the challenge to Juror Hibler. As was previously stated, the writ does not lie to relitigate matters finally decided by this Court. Auman v. State, supra; Wetzel v. State, ____ Miss. ____, 76 So.2d 846 (1955); Miss. Code Anno. § 99-35-145 (1972).

As for juror Hopkins, if petitioner had desired to challenge the removal for cause due diligence dictated that he should have done so at both the trial level and on direct appeal. Auman v. State, supra; Holloway v. State, supra. Inasmuch as the question should have been properly preserved and presented on direct appeal and was not, the Court must under its own rules construe the point as forfeited.

PROPOSITION (2)

The second ground, although somewhat a variation of the first ground, is raised here for the first time. The question, therefore, requires an examination of the pertinent factors to

determine if through the exercise of due diligence the question could have been raised on direct appeal.

Obviously, the events of which petitioner complains occurred during the trial of this matter. Concomitantly, a record could have been made at that time. In this same context, the cases cited by petitioner, Witherspoon v. Illinois, 391 U.S. 510 (1968); Hovey v. Superior Court, 616 P.2d 1301 (Sup. Ct. Cal. 1980), Duren v. Missouri, 439 U.S. 357 (1978); Ballew v. Georgia, 435 U.S. 223 (1978); Guisley v. Wheeler, 637 F.2d 525 (8 Cir. 1980) and People v. Wheeler, 583 P.2d 748 (Cal. 1978), had been decided at the time of trial. Therefore, no recognizable excuse exists for the failure of counsel to raise these precise issues either at the trial level or on direct review, and it is precluded from review by this Court. Auman v. State, supra; Holloway v. State, supra.

The comments on this subject in the recent case of Callahan v. State, 419 So.2d 165, 171 (Miss. 1982), are appropriate.

> Pursuant to the requirements of Mississippi Supreme Court Rule 6(b), we cannot consider such arguments there that were not presented to the lower court, or were not preserved in the lower court and were not advanced on appeal to this Court.

Clearly, petitioner did not raise this precise issue on direct appeal, and a post-conviction writ may not be used as a substitute. Holloway v. State, supra.

PROPOSITION (3)

The question raised in ground three was presented to this Court in Point Three of petitioner's brief on direct appeal. The decision on direct appeal is res judicata.

Speaking to this point, this Court held:

> Thirdly, the defendant argues that he was denied a constitutionally fair trial because the state was allowed to show a "separate and distinct crime." His contention is that the lower court erred in allowing Officer David Williams to give hearsay

testimony that the appellant had threatened to kill a woman over some money. The matter came up when the state, in presenting its case in chief, offered the testimony of Officer David Williams who was called for his testimony regarding his seizure of a pistol from the defendant which was later established to be the weapon used in the murder of the deceased Dixon. The testimony in question of Officer Williams was as follows:

Q. About what time was this?

A. Approximately 3:00 o'clock in the morning.

Q. Just continue as to what was happening at that time.

A. At that time we were engaged in a brief conversation with Mr. Freddie Tubbs when we received information that an individual was across the street at a rooming house in the doorway with a weapon and the individual stated that he was gonna kill a girl over some money.

Following the above testimony, the defendant objected and the jury was excluded while the matter was considered by the judge and the lawyers. At that time, defense counsel agreed to the court's offer to admonish the jury to disregard the statement. The court admonished the jury not to let the testimony in question "have any bearing" on their verdict and the record clearly shows that each juror raised his hand indicating his willingness to follow the court's admonishment. The record does not indicate that the state intentionally elicited the hearsay report, but only asked Officer Williams, "What was happening at that time." Our rule is that absent a showing to the contrary, jurors are presumed to follow the court's direction with regard to testimony. Hughes v. State, 376 So.2d 1349 (Miss. 1979); Butler v. State, 375 So.2d 1039 (Miss. 1979); Gray v. State, 375 So.2d 994 (Miss. 1979); Duke v. State, 340 So.2d 727 (Miss. 1976).

We think the record clearly shows that the challenged testimony was not elicited to establish its truth or to establish that the defendant killed Dixon. As to the taking of the gun from the defendant, defense counsel stated, "We have no qualms with that." No motion or request for a mistrial was made by the defense and the court granted the defense all that was requested. In view of the context of the testimony and the court's admonishment of the jurors, the argument does not warrant reversal.

Edwards v. State, supra, at 1009-1010.

Since a writ of error coram nobis does not lie to relitigate matters previously decided, the point, to say the least, lacks merit. Auman v. State, supra; Wetzel v. State, supra.

PROPOSITION (4)

The fourth ground alleges a Fourteenth Amendment Due Process violation based upon the State's closing argument to the jury in the penalty phase of the trial. Once again this argument appears to be a variation of Point Eight on direct appeal.

The gravamen of the argument on direct appeal focused upon a rather specious argument that after receiving two reprimands from the Court for the content of his closing remarks, defense counsel became ineffective for the remainder of the trial and alienated the jury against the defendant. Concommitantly, the District Attorney made in retort to defense counsel several remarks about the defense. An objection was interposed and the court sustained it, admonishing the State to remain within the correct parameters of closing argument. See 413 So.2d at 1012-1013 for text of Court's opinion on the subject. The ground now urged was not properly preserved at the trial level nor was it urged on appeal. Therefore, under the clear line of authority petitioner is barred from raising this point in proceedings of this nature.

PROPOSITION (5)

The central thrust of this argument focuses upon the contention that Edwards was unconstitutionally sentenced to death in that there was not a finding that he killed, attempted to kill, intended to kill, or contemplated that lethal force would be employed, as required by Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).

Our analysis of this question should first focus on whether this precise issue was raised on direct appeal. A review of the assignments of error reveal that it was not. [See Appellant's Brief on direct appeal.] The second inquiry should focus on

whether the question could have been and should have been raised at the trial level and/or on direct appeal. The conclusion is somewhat complex. First, we find that the decision in Enmund was rendered on July 2, 1982. Edwards was sentenced to death on April 3, 1981. How then can the petitioner be held accountable to anticipate a decision over a year later? The answer is found in Engle v. Isaac, supra. There the Court held:

> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated the claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural bar. Engle, supra, at 102 S.Ct. at 1575.

Following this reasoning, the superstructure upon which Enmund is constructed are the decisions in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977), and Lockett v. Ohio, 458 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). Both of these decisions were obviously decided before the crime in this case was even committed. Likewise questions of this nature were raised in the cases of Voyles v. State, 362 So.2d 1236 (Miss. 1978), Culberson v. State, 379 So.2d 499 (Miss. 1980), and Bullock v. State, 391 So.2d 601 (Miss. 1981), all of which were decided prior to trial.

Subsequent to conviction but before briefs were filed on direct appeal, the Fifth Circuit decided Washington v. Watkins, 655 F.2d 1346 (5 Cir. 1981). In Washington the court specifically addressed this question, holding:

> In a separate argument, Washington contends that the Eighth and Fourteenth Amendments forbid imposition of the death penalty in the absence of a finding that Washington deliberately, purposely, or intentionally acted to take a human life, relying chiefly on Justice White's opinion in Lockett v. Ohio, 438 U.S. 586, 624-28, 98 S.Ct. 2954, 2983-85, 57 L.Ed.2d 973 (White, J., concurring in part and in the judgment, and dissenting in part). See generally Comment,

> The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous.L.Rev. 356 (1978). Given our holding below in part III-E of this opinion, we expressly decline to address this argument. We note, however, that this contention would relate only to the imposition of the death penalty - not to Washington's guilt or innocence - and at best could have left him facing a mandatory life sentence with no possibility of parole, see Miss. Code Ann. § 99-19-104 (1980 Supp.). Hence, it can hardly be argued that Reeves should have abandoned the alibi defense that was preferred by his client in favor of a constitutional argument that thus far has been accepted by only one of the Court's nine Justices, and that at best would have left his client in prison for life without possibility of parole.
>
> Id., at 1366 [2/]

The conclusion is, therefore, inescapable. A foundation in law existed on this point both prior to trial and to the filing of briefs on direct appeal. The question could have been raised at that time and was not. Due diligence requires that such questions be timely raised, and error coram nobis is not a substitute for direct appeal. Auman v. State, supra; Holloway v. State, supra.

Assuming arguendo that the matter is not procedurally barred in light of this Court's comments that "a more calloused and unjustifiable killing could hardly be imagined," Edwards v. State, supra, at 1013, we shall address the merits of the claim for clarification purposes. See: Ratcliff v. Estelle, supra; County Court of Ulster Cty. v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Thomas v. Blackburn, 623 F.2d 383 (5 Cir. 1980); Miller v. Estelle, 677 F.2d 1080 (5 Cir. 1982). Before elaborating upon the facts in the instant matter, let us first review the standards established by Enmund.

[2/] Once again Judge Randall has misconstrued Mississippi law concerning eligibility of parole just like she did in Bell v. Watkins, supra, on Rule 42.

Enmund's petition for certiorari was granted, ___ U.S. ___, 70 L.Ed.2d 246, 102 S.Ct. 473 (1981), to consider the validity of the death penalty under the Eighth and Fourteenth Amendments "'for one who neither took life, attempted to take life, nor intended to take life.'" Enmund, supra, 73 L.Ed.2d at 1145. A review of the opinion reveals that this question was consistently considered in the disjunctive rather than the conjunctive throughout.

> It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape.
>
> 73 L.Ed.2d at 1146.
>
> While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," Coker v. Georgia, 433 U.S., at 596, nor as compelling as the legislative judgments considered in Coker, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.
>
> 73 L.Ed.2d at 1149.
>
> That is not relevant to this case, however. Rather at issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill.
>
> 73 L.Ed.2d at 1149 n. 15.
>
> Petitioner's argument is that because he did not kill, attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that judges - and perhaps prosecutors as well - consider death a disproportionate penalty for those who fall within his category.

* * *

> Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.
>
> 73 L.Ed.2d at 1151.
>
> Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. . . . Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.
>
> 73 L.Ed.2d at 1152.

The conclusion is, therefore, obvious. The death penalty is permissible where one of three or four conditions exists: i.e., (1) where the defendant killed, (2) where the defendant attempted to kill, (3) or where the defendant intended that a killing take place or that lethal force will be employed. Buttressing the proposition that deliberate intent is not necessary where the defendant himself killed is the recent case of Hopper v. Evans, ____ U.S. ____, 72 L.Ed.2d 367, 102 S.Ct. ____ (1982), where the Court held:

> In this Court, respondent contends that he could have been convicted under Ala. Code § 13-1-70, which makes a "Homicide . . . committed in the perpetration of, or attempt to perpetrate any . . . robbery" a non-capital offense. Respondent concedes that a conviction is warranted under this section only when a defendant lacks intent to kill. Respondent's Brief, at 26. Respondent's current claim is a curious - even cynical - new version of the claim of self-defense. His testimony given in the trial court was:

> "I was going to shoot him if he reached for a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody, if you don't have to. That's - that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well - that's pure instinct. That's self-preservation. I was going to fire; I'm not going to waste any time . . .."
>
> App. 19 (Empahsis supplied).

> On the basis of this testimony, he implies that he had no malice toward the victim nor intent to kill him. Of course, it can be argued that this case is not one of a killer with affirmative, purposeful malice; his claim bears some resemblance to that of a hired killer who, bearing no ill will or malice toward his victim, simply engages in the pursuit of his chosen occupation. Respondent thus blandly - even boldly - proclaims that, although he will try not to kill his victims, he will do it if he finds it to be an occupational necessity.
>
> It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back in the circumstances shown here. The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was therefore not warranted. See Fulghum, supra.
>
> 72 L.Ed.2d at 374.

Let us now examine the pertinent factors sub judice. During the sentencing phase of the trial, the Court instructed the jury that as an aggravating circumstance they might find:

> 3. The capital murder was committed for the purpose of avoiding lawful arrest;
>
> R. 829, Jury Instruction No. 1.

As is reflected in the jury's verdict, R. 835, this was one of the factors which they found and upon which they relied in returning a verdict of death.

In Gray v. State, 375 So.2d 994, 1004 (Miss. 1979), the same aggravating circumstance was found. In relating this finding to

the question of intent, this Court held:

> It is now contended in Gray's behalf that a "very serious" dispute exists as to whether Gray had the deliberate design to effect the death of the child. However, the jury had before it all of the evidence given during the trial of the guilt phase. Moreover, the trial court had instructed the jury that it might find as a mitigating circumstance "Any other matter brought beofre you which you deem to be mitigating on behalf of the Defendant." From Gray's statements introduced into evidence and from the testimony of Dr. Stanley, the jury was fully aware of the statements made by Gray that the child's death had been accidental. Upon the entire record, the jury was justified in finding beyond a reasonable doubt that the child had been killed by Gray intentionally and maliciously for the purpose of silencing her outcries or preventing the report by her of acts of molestation. The crime was brutish and cruel, committed upon a helpless and trusting child, for a sordid motive. It was the second human life appellant had taken.

On appeal from the denial of habeas corpus, Judge Clark, speaking for the Fifth Circuit in Gray v. Lucas, 677 F.2d 1086, 1103 (5 Cir. 1982), commented on this same topic:

> Grays' attack on Mississippi's capital punishment statute is itself composed of nine separate arguments. First, Gray claims that Mississippi allows a jury to impose the death sentence when there has been no finding of intent. See Miss. Code Ann. § 97-3-19(2). Gray argues that because there was no finding either at the guilt or sentencing phase of his trial that he purposefully or intentionally acted to kill Derissa Scales, death is an excessive penalty in violation of the eighth amendment. Although this claim might pose a difficult question of constitutional law, we need not resolve it in this case since the assumption underlying the argument is missing in Gray's case.
>
> The jury found beyond a reasonable doubt that Gray had purposefully taken Derissa Scales' life to avoid capture. In reviewing Gray's conviction, the Mississippi Supreme Court stated:
>
> > It is now contended in Gray's behalf that a "very serious" dispute exists as to whether Gray had the deliberate design to effect the death of the child. However, the jury had before it all of the evidence given during the trial of the guilt phase. . . . Upon the entire

> record, the jury was justified in finding beyond a reasonable doubt that the child had been killed by Gray intentionally and maliciously for the purpose of silencing her outcries or preventing the report of her of acts of molestation.
>
> Gray v. State, 375 So.2d at 1004. The state court's determination of what the jury was permitted to find and obviously did find is presumptively correct unless rebutted, which Gray has not attempted to do. See Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Again on petition for rehearing, the Fifth Circuit held:

> Gray was convicted of capital murder under Miss. Code Ann. § 98-3-19(2)(e). That statute applies by its terms to both intentional and unintentional killings that occur during the commission of certain felonies. Therefore, Gray argues that we must address the ticklish question whether capital punishment for an unintentional killing comports with eighth amendment standards.
>
> We disagree. It is undisputed that at the sentencing phase of Gray's bifurcated trial the jury found beyond a reasonable doubt that Gray had killed Derissa Scales for the purpose of avoiding arrest. This finding is equivalent to a finding of intent. Taking a human life for a deliberate and particular purpose, such as to avoid arrest, is necessarily intentional murder. For this reason we affirm our earlier conclusion that we need not reach the "difficult question of constitutional law" posed by capital punishment for an unintentional killing. 677 F.2d at 1103.
>
> Gray v. Lucas, 685 F.2d 139, 140 (5 Cir. 1982).

With a finding of intent having been made, the claim lacks substance on the merits.

We conclude this point again with the caveat that we submit that the question is procedurally barred; however, for the benefit of the bench and bar we request that once the procedural forfeiture is invoked the Court comment on the merits in the fashion permitted in Ratcliff v. Estelle, supra.

PROPOSITION (6)

In this sixth ground, petitioner seeks once again to submit for the initial time, an issue of a substantive nature. As noted in proposition 2 of this response (p. 30) his entitlement to review of this matter must rest on a showing that the question could not have been raised through the exercise of due diligence on direct appeal.

Quite clearly, the alleged error, i.e., the inclusion of non-statutory aggravating circumstances during the penalty phase, occurred during the trial of this cause. Resultingly, it could have been objected to at that point and preserved for appellate review. Similarly, of the cases relied on by petitioner, Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980) and Coleman v. State, 378 So.2d 640 (Miss. 1979) were rendered prior to the time of trial. The original opinion in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) was rendered prior to the oral argument of petitioner's direct appeal on March 24, 1982. [3/] Only Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982) was not of record before the disposition of petitioner's direct appeal. However, even a cursory reading of that portion of Gray cited in the petition indicates that cases embodying the same rule existed at a time whereby petitioner could have availed himself of their rhetoric.

In conclusion, there appears no recognizable excuse for defense counsel's failure to enliven this issue at the trial level or on direct review. The inevitable result of this failure is that the issue is firmly precluded from review by this Court.

3/ Henry was subsequently reversed and remanded by the United States Supreme Court (102 S.Ct. 2922), but ultimately, on remand, the original judgment was reinstated amid substantially the same language utilized in the original opinion.

Auman v. State, supra; Holloway v. State, supra; and Callahan v. State, supra.

PROPOSITION (7)

In a repeated effort to inject newly found matters into this narrowly limited post-conviction proceeding, petitioner alleges that the inclusion of both "for pecuniary gain" and "engaged in the commission of robbery" as aggravating circumstances unfairly shifted the burden of proof and "stacked" the circumstances against him. As is becoming much the watchword in this response, the State would again note that petitioner cannot assert at this juncture for a first time that which he could have raised before the trial court had he exercised due diligence.

It is readily apparent that petitioner omitted any objection on the ground now assrted at the time the aggravating circumstances were enumerated to the jury. In a related course of inaction, he did not raise the issue on direct appeal, despite the fact that all the cases he relies on, Godfrey v. Georgia, 382 So.2d 1162 (Ala. Ct. Crim. App. 1980), State v. Cherry, 257 S.E.2d 552 (N.C. 1979), State v. Rust, 250 N.W.2d 867 (Neb. 1977), and Sandstrom v. Montana, 439 U.S. 1126 (1979), were decided long before his trial.

Once again the State must urge the Court to bar review of this claim on the basis that the claim could have been raised in the lower court. It bears repeated note that a post-conviction writ cannot be used as a substitute for contemporaneous preservation of alleged error for future appellate review. Holloway v. State, supra. By virtue of Callahan v. State, supra, this Court ". . . cannot consider such arguments . . . not presented to the lower court, . . . preserved in the lower court (or) advanced on appeal to this court."

IV. CONCLUSION

Currently, there are five death penalty cases pending before this Court on direct appeal, three pending petitions for writs of certiorari, one pending leave to file a writ of error coram nobis, and four pending in the federal courts on habeas corpus. What this Court decides in this case will definitely impact upon the final determination of all of these cases.

This Court stands in the fork of the road. If it elects to follow the Irving - Culberson - Laney road, the State in light of Hathorn and Bell doubts that it will ever be successful in carrying out a sentence of execution. This line of authority in reality allows a defendant to raise any question at any time. The policy comments of the United States Supreme Court in Wainwright v. Sykes, supra, at 90, 53 L.Ed.2d at 610, are extremely cogent:

> We believe the adoption of the Francis rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

When one reflects upon the Irving line of authority, one finds that it is in reality perverting justice. Stripped to its simplest terms, this Court has in actuality ruled that given the more depravity of the crime and severity of the punishment, the more likely the criminal is to obtain a reversal. Converse-

ly, the less serious the crime and punishment, the less likely one is to obtain a reversal. There are serious equal protection questions lurking in the shadows if this Court continues its stated course.

If the other fork is taken, a clarion message will be sent to all those who violate the law. The State will afford you one opportunity to vindicate your rights. However, you had better put all your eggs in one basket. Otherwise, if through the exercise of due diligence you could have raised the claim at the trial level and/or on appeal, then you have forfeited the claim, and it is forever barred. Simply stated, post-conviction petitions are not and cannot be used as an alternative means of appeal. Exemplary application of the suggested course dictates dismissal of Edwards' application.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

AMY WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: _____
AMY WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: _____
WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

We, Amy Whitten and William S. Boyd, III, Special Assistant Attorneys General for the State of Mississippi, do hereby certify that we have this day caused to be mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Response to Application for Leave to File a Petition for Writ of Error Corma Nobis and/or Writ of Habeas Corpus to:

David W. Clark, Esquire
Wise, Carter, Child & Caraway
Attorneys at Law
Post Office Box 651
Jackson, Mississippi 39205

and

Samuel W. Murphy, Jr., Esquire
Robert Garcia, Esquire
Cameron L. Cowan, Esquire
Donovan, Leisure, Newton & Irvine
Attorneys at Law
30 Rockefeller Plaza
New York, New York 10112

Attorneys for Petitioner

This, the 20th day of January, 1983.

AMY WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

Connie Ray EVANS

v.

STATE of Mississippi.

No. 53754.

Supreme Court of Mississippi.

Nov. 3, 1982.

Rehearing Denied Dec. 15, 1982.

Defendant was convicted in the Circuit Court, Hinds County, William F. Coleman, J., on his plea of guilty, of capital murder, and the jury sentenced him to death, and he appealed. The Supreme Court, Roy Noble Lee, J., held that: (1) trial court did not err in striking for cause juror who was irrevocably committed to vote against death penalty regardless of facts and circumstances presented; (2) trial court did not err in admitting evidence of defendant's suspended sentence for nonviolent crime as proof that capital murder was "committed by a person under sentence of imprisonment"; (3) trial court did not err in admitting into evidence proof of matters admitted by defendant by his plea of guilty; (4) lower court did not err in overruling motion for mistrial when witness testified that victim's pregnant wife appeared at scene of crime shortly after it occurred; (5) defendant's statement to accomplice soon after homicide that he killed victim because he was "cold hearted" was relevant on issue of aggravating circumstances; (6) there was no error in cross-examination of defendant's mother about his prior juvenile record; (7) trial judge was not required to make advance ruling on admissibility of defendant's letter to accomplice, and such refusal was not error; (8) there was no reversible error in court's instructions to jury; (9) district attorney's statement did not constitute prejudical or reversible error; and (10) punishment of death was not too great.

Affirmed.

1. Jury ⇐108

Trial court did not err in striking for cause juror who was irrevocably committed to vote against death penalty regardless of facts and circumstances presented.

2. Homicide ⇐354

When person has been convicted and placed on probation, such sentence is sentence under imprisonment for purpose of aggravating circumstance, in capital murder trial, that murder was "committed by one under sentence of imprisonment." Code 1972, § 99-19-101(5)(a).

3. Homicide ⇐354

Trial court did not err in admitting evidence of defendant's suspended sentence for nonviolent crime as proof that capital murder was "committed by a person under sentence of imprisonment," and in any event, there were other aggravating circumstances sufficient to sustain conviction for capital murder. Code 1972, § 99-19-101(5)(a).

4. Criminal Law ⇐986.6(3)

In sentencing phase of death penalty case, slides showing cash register and open cash drawer found by police shortly after robbery-murder and slides showing body of victim and surrounding store area were competent and relevant on issues of whether capital offense was committed while defendant was engaged in commission of robbery, whether capital offense was committed for purpose of avoiding or preventing lawful arrest and whether capital offense was especially heinous, atrocious or cruel, and there was no error in admission of slides, despite fact defendant had admitted the homicide. Code 1972, § 99-19-101.

5. Homicide ⇐354

Even though it might have been said that facts of homicide did not pass constitutional muster on aggravating circumstance of being especially heinous, atrocius or cruel, three other aggravating circun stances were proved by overwhelming evidence.

6. Criminal Law ⇐986.6(3)

At sentencing phase of death penalty case, testimony of victim's brother, who was

emotional and sobbed on witness stand, was for purpose of identifying victim and was relevant and had probative value.

7. Criminal Law ⇐986.6(3)

At sentencing phase of death penalty case, defendant's entire confession was properly admitted in evidence, as a part of the orderly presentation of State's case, and was relevant on issues of aggravating circumstances submitted to jury.

8. Criminal Law ⇐867

At sentencing phase of death penalty case, lower court did not err in overruling motion for mistrial when witness testified that victim's pregnant wife appeared at scene of crime shortly after it occurred, where each juror said that he or she would disregard statement and court further instructed jury to "disregard all evidence which was excluded by the court from consideration during the course of the trial."

9. Criminal Law ⇐1144.15

Jury is presumed to have followed directions of judge.

10. Criminal Law ⇐986.6(3)

At sentencing phase of death penalty case, defendant's statement to accomplice soon after homicide that he killed victim because he was "cold hearted" was relevant on issue of aggravating circumstances.

11. Witnesses ⇐345(4), 374(1)

Youth Court Act prohibits use of adjudication of Youth Court for impeachment purposes in any court, except that right of defendant or prosecutor in criminal proceedings is preserved to show bias or interest. Code 1972, § 43-21-101 et seq.

12. Witnesses ⇐274(2)

At sentencing phase of death penalty case, there was no error in cross-examination of defendant's mother about his prior juvenile record, where no reference was made to Youth Court proceedings or action, no attempt was made to introduce any adjudication order and questions were proper to test recollection of witness and were in rebuttal. Code 1972, § 43-21-101 et seq.

13. Criminal Law ⇐986.6(3)

At sentencing phase of death penalty case, trial judge was not required to make advance ruling on admissibility of defendant's letter to accomplice, and such refusal was not error.

14. Criminal Law ⇐986.6(1)

At sentencing phase of death penalty case, there was no error in refusing jury instruction which was covered by another instruction granted by court, no reversible error in giving instruction which was too restrictive and no error in refusing instruction the sense of which was submitted in other instructions.

15. Criminal Law ⇐723(1), 726

At sentencing phase of death penalty case, statement by district attorney which defendant argued was an insinuation that, if jury fixed sentence at life, defendant would not serve life in penitentiary, did not say what defendant interpreted it to say, and if argument was improper, then it could be said that defendant's attorney provoked comment in response to his argument.

16. Homicide ⇐354

Punishment of death for robbery-murder was not too great when aggravating and mitigating circumstances were weighed against each other, and death penalty was not wantonly or freakishly imposed.

17. Homicide ⇐354

Sentence of death was not imposed under influence of passion, prejudice or any other arbitrary factor, where evidence overwhelmingly supported jury's finding of at least one statutory aggravating circumstance.

18. Homicide ⇐354

Sentence of death for robbery-murder was not excessive or disproportionate to other capital cases, considering both crime and manner in which it was committed and the defendant.

Bell & Collins, James D. Bell, Jackson, for appellant.

Bill Allain, Atty. Gen. by Amy D. Whitten, Sp. Asst. Atty. Gen., Jackson, for appellee.

En banc.

ROY NOBLE LEE, Justice, for the Court:

Connie Ray Evans and Alfonso Artis were jointly indicted in the Circuit Court of the First Judicial District of Hinds County, Honorable William F. Coleman, presiding, on a charge of capital murder. Evans entered a plea of guilty to the charge and the trial proceeded on the sentencing phase. After hearing the evidence, the jury found Evans guilty and sentenced him to death. He has appealed and assigns ten (10) errors in the trial below.

FACTS

Connie Ray Evans was twenty-one (21) years of age at the time of the homicide. On the night of April 7, 1981, he and Alfonso Artis, age twenty-four (24), met at the Alamo Theater on Farish Street in the City of Jackson, Mississippi, and planned to rob R.J.'s Food Center on Lynch Street. They considered the fact that gunplay might be involved in the robbery. About 6:30 the following morning, Artis went to the house where Evans lived with his mother and stepfather, and they left together for the R.J. Food Center. Upon arrival there, they walked by the store on two occasions but did not enter because customers were present. After waiting approximately one-half hour, they began the robbery. Artis went inside with a gun while Evans waited outside and watched for trouble. Artis drew the gun on Arun Pahwa, the store attendant, and forced him at gunpoint to get on his knees behind the counter. Evans entered the store, received the gun from Artis, held it on Pahwa and guarded him while Artis checked the cash register. Artis could not open the cash drawer, and Pahwa was made to get up from the floor, open the cash register and then was forced to kneel again. Artis collected money from the cash register and then searched and emptied Pahwa's pockets and wallet.

Evans shot Pahwa in the head as he knelt motionless behind the counter and the two ran out the door. They had obtained approximately one hundred forty dollars ($140.00) in the robbery. Artis took off his shirt and wrapped the gun in it as they ran. Later, he gave the gun to Evans, who wiped away some of the fingerprints, and they hitchhiked to appellant's brother's house where Evans hid the gun behind a clock. They left there, caught a bus to the downtown area, and spent most of the money on new clothes. That night, they went to a movie, drank beer at a local club, then separated and went home. Evans told Artis that he shot Pahwa because "I was cold hearted."

The police were notified of the robbery and murder and went to the scene where they found the cash drawer open and Pahwa lying behind the counter in a pool of blood. The cause of death was a gunshot wound in the head. As a result of the police investigation, Artis was apprehended on the night of April 8, 1981, and Evans was arrested seventeen (17) days later on April 25, 1981. He stayed on the streets during this time and finally telephoned his mother and decided to give himself up. Evans gave a written confession to the crime. Artis pled guilty to charges of armed robbery and manslaughter and received a sentence of twenty (20) years, with fifteen (15) years suspended. He testified for the State on the trial.

LAW

I.

Did the trial court err in striking for cause a juror who was irrevocably committed to vote against the death penalty regardless of the facts and circumstances presented?

On voir dire examination, a female juror stated that she had conscientious scruples against the infliction of the death penalty; and that she had strong feelings about sending somebody to jail or giving them the death penalty. She said:

Q. I would assume that the lesser of the two would be to send someone to jail, so are you sure that you couldn't sentence someone to death?

A. I am positive.

Q. You are positive you couldn't return a verdict recommending the death penalty, is that correct?

A. Yes, sir.

The prospective juror qualified her feeling against the death penalty by saying that, if a person had killed several people she probably could vote for the death penalty. Also, she vacillated some when interrogated by the appellant's attorney. She responded further:

Q. I see. So a murder in the process of a robbery you could not vote for the death penalty under any circumstances, is that correct?

A. (Juror nodded)

. . . . . .

Q. No question in your mind about that? You could not follow the law if the law was that you are to consider the death penalty and you decide on whether or not it's a bad enough case, and you couldn't even consider it if it was just one person killed?

A. If someone killed someone else, like I said, out of fear because they had robbed a store, no.

Q. I'm not asking you in self-defense or anything like that. Self-defense we wouldn't be here. He wouldn't have pled guilty.

A. (Juror nodded negatively).

Q. Your answer is still no, you could not consider it?

A. (Juror nodded negatively).

Q. Under any circumstances?

A. (Juror nodded).

The principle involved here was stated in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). It has been followed many times, and recently in *Edwards v. State*, 413 So.2d 1007 (Miss. 1982), where the Court said:

First argument made relates to the exclusion of juror Hibler on the ground of "conscientious scruples" against the death penalty. Juror Hibler was asked by the circuit judge if she could follow the testimony and instructions of the court although the "verdict could result in the death penalty"; juror Hibler said, "I couldn't."

Upon this state of juror Hibler's voir dire examination, she was excused and the defendant urges reversible error under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Having categorically stated that she couldn't follow the testimony and instructions of the court, we think that the juror was correctly excluded. The fact that upon questioning by defense counsel, Hibler stated she would try to be a "fair" juror did not qualify her in this case. Similar argument was made in *Edwards v. State*, *supra*, n. 1, but there the sentence was life imprisonment whereas here the sentence is death. Thus, the two cases are not precisely analogous. For an excellent explanation of the proper method of bringing the death penalty to the attention of the special venire in capital cases, see *Armstrong v. State*, 214 So.2d 589 (Miss.1968). [413 So.2d at 1009].

See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1969); *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

In *Irving v. State*, 361 So.2d 1360 (Miss. 1978), we said:

Following *Witherspoon*, this Court considered the procedure to be employed by trial judges in *Myers v. State*, 254 So.2d 891 (Miss.1971). That procedure follows:

> "The proper method of bringing the death penalty to the attention of the special veniremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask

them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, *the trial judge* should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a venireman is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instructions of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.' (Emphasis added). *Armstrong v. State*, Miss., 214 So.2d 589, at 593." 254 So.2d at 893–894. [361 So.2d at 1360].

[1] We are of the opinion that there is no merit in the first assignment.

II.

Did the lower court err in admitting evidence of appellant's non-violent criminal record as proof that the capital murder was "committed by a person under sentence of imprisonment," pursuant to Mississippi Code Annotated § 99-19-101(5)(a) (Supp. 1982)?

The appellant contends that when an accused receives a suspended sentence for a non-violent crime, such sentence may not be subsequently used in a capital murder trial to prove that, as an aggravating circumstance, the murder was "committed by one under sentence of imprisonment." He relies upon *Peek v. State*, 395 So.2d 492 (Fla. 1980), wherein the Florida Supreme Court held that a defendant's probationary status was not a sentence of imprisonment, which would support Subsection (5)(a) of the statute. However, in *Peek* the death sentence was upheld on appeal in spite of the court's determination that a probated sentence had been erroneously included as an aggravating circumstance. The Florida Court said:

> Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid. *Hargrave v. State*, 366 So.2d 1 (Fla.1978); *Elledge v. State*, 346 So.2d 998 (Fla.1977). [395 So.2d at 499–500].

Subsequent to *Peek v. State*, the Florida Court said in *Lewis v. State*, 398 So.2d 432 (Fla.1981):

> The finding that appellant committed the capital felony while under a sentence of imprisonment was based on the fact that he was on parole from a prison sentence at the time of the murder. Based on evidence of this fact, we approve the court's finding of this aggravating circumstance. [398 So.2d at 438].

In *Dobbert v. State*, 375 So.2d 1069 (Fla. 1979), cert. den. 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862, reh. den. 448 U.S. 916, 101 S.Ct. 37, 65 L.Ed.2d 1179, the Florida Court held, and the United States Supreme Court denied certiorari, that:

> Although two aggravating circumstances were improperly determined to exist, we conclude that the trial court properly found that the murder was committed to avoid lawful arrest and was especially heinous and cruel. . . .
>
> . . . . . .

> . . . The evidence is not such as would require the trial court to find any of the mitigating circumstances proposed by Dobbert as a matter of law. Since there are one or more validly found aggravating circumstances and no mitigating circumstances, a reversal of the death sentence is not necessarily required. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *Hargrave v. State*, 366 So.2d 1 (Fla.1978). [375 So.2d at 1070, 1071].

Jackson v. State, 381 So.2d 1040 (Miss. 1980), involved an appeal from an enhanced sentence where it was contended that the statute required that a defendant actually serve the sentence through physical incarceration (Jackson's prior sentence had been suspended). We held the following:

> Jackson argues the conjunctive phrasing "and who shall have been sentenced . . ." evidences a legislative intent to include within the class of habitual offenders only those who have been twice convicted of distinct felonies for which penitentiary terms have not only been pronounced as punishment, but also served through actual incarceration. We reject this argument, because we think the statutory intention is satisfied where, as here, the accused has been twice previously adjudged guilty of distinct felonies upon which sentences of one year or more have been pronounced, irrespective of subsequent probation or suspension of the sentences.
>
> We are of the opinion the statute is intended to cure the evil of recidivism. Enhanced punishment relates to the conduct underlying the previous convictions. Adjudication of guilt and consequent pronouncements of sentences merely accord those convictions finality. Subsequent suspension of the sentences or probation is a matter of grace only, arising from the hope that the prospects of rehabilitation of the guilty warrant leniency. Clearly that hope is defeated when the beneficiary of the indulgence perpetuates further felonies. The statute is suited precisely to this problem. [381 So.2d at 1042].

[2, 3] We are of the opinion that, under Mississippi statutes and decisions, when a person has been convicted and placed on probation, particularly here, where four (4) years of a five-year sentence were suspended, such sentence is a sentence under imprisonment. Even so, there were other aggravating circumstances in the present case, and, under the Florida decisions, they were sufficient to sustain the conviction.

III.

Did the trial court err in admitting into evidence at the sentencing phase of a death penalty case, proof of matters admitted by the defendant by his plea of guilty in open court, where such proof was not related to the aggravating circumstances set forth in Mississippi Code Annotated § 99-19-101 (1972)?

Appellant argues that certain evidence and exhibits introduced were erroneous and prejudicial since he pled guilty to the robbery-murder and that proof should have been limited to matters not admitted in his guilty plea. An orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. Facts relevant to an aggravating circumstance are competent. The statute sets forth eight (8) aggravating circumstances, any one, or more, of which may be proved. The State introduced nine (9) color photographs showing the body of the victim and the scene of the crime. Appellant contends that they were inflammatory and, since he had admitted the homicide, were not relevant in the sentencing phase.

[4] Slides 1 and 2 show the cash register and the open cash drawer found by the police shortly after the robbery-murder. Slices 3 through 9 show the body of the victim and the surrounding store area. We think that the slides were competent and relevant on the issues of whether or not (1) the capital offense was committed while the appellant was engaged in the commission of robbery, and (2) the capital offense was committed for the purpose of avoiding or preventing lawful arrest, and (3) the capital offense was especially heinous, atrocious or

cruel. In *Coleman v. State*, 378 So.2d 640 (Miss.1978), the Court had for consideration two (2) color photographs showing where shotgun pellets hit the victim on the right side of the head, lower arm and left side of his chest. The Court held that they were competent and had probative value on the aggravating circumstance of especially heinous, atrocious or cruel.

We have examined the opinions in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.1982),[1] which discussed the phrase in an aggravating circumstance "outrageous or wantonly vile, horrible or inhuman in that they involved ... depravity of mind ...." (Georgia) and "was especially heinous, atrocius or cruel." (Mississippi). The decision of the Georgia Supreme Court in *Godfrey* was reversed, the United States Supreme Court holding that the Georgia court did not apply a proper constitutional construction of the phrase. *Jordan* was reversed, following *Godfrey*, on the ground that in *Jackson v. State*, 337 So.2d 1242, 1250 (Miss.1976), the Mississippi Supreme Court gave no proper guidance to the jury for imposition of the death penalty on that aggravating circumstance.[2]

[5] In the case sub judice, the victim was forced to kneel on the floor behind the counter with a .38-caliber revolver pointing at his head, he was made to stand up at gunpoint and open the cash register, and again was forced to kneel on the floor with the revolver still pointing at his head. He was physically assaulted by one of the robbers emptying his pockets, all occurring over a short period of time. From those facts, the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel. Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence.

[6] Dr. Baldev Pahwa, brother of the deceased, testified for the State and identified his deceased's brother from one of the photographs. The witness was emotional and sobbed on the witness stand.[3] The appellant argues that the testimony was calculated to inflame the jury more than the pictures introduced. We are unable to say that his testimony was not relevant and did not have probative value. It was for the purpose of identifying the victim and, as we have said in other cases, the appellant caused the situation and cannot complain, if the evidence has probative value.

Appellant next contends the court should have stricken from the appellant's confession (1) that part setting forth he and Artis planned to rob the food store and possibly slay the store clerk, (2) that he saw "Alfonso behind the counter pointing the gun at the man who was down on the floor on his knees," (3) that part relating to what appellant and Artis did following the murder, (4) that part stating it was his idea to rob R.J.'s Food Center, and (5) that part to the effect that he shot the man because "The man knew me and I did not want him to identify me."

[7] We think that the entire confession was properly admitted in evidence. It was a part of the orderly presentation of the State's case and was relevant on the issues of aggravating circumstances submitted to the jury.

IV.

Did the lower court err in overruling the motion for mistrial when a witness testified

1. All trial judges should study the opinions in *Godfrey* and *Jordan* before submitting the aggravating circumstances in § 99-19-101(5)(h) to the jury.

2. Decided before enactment of Mississippi Code Annotated § 99-19-101 (Supp.1977).

3. The appellant's mother testified in his behalf. While on the witness stand, she sobbed, cried and was as emotional, or more so, than Dr. Pahwa.

that the victim's pregnant wife appeared at the scene of the crime shortly after it occurred?

Officer Willie Allen testified for the State, and during his testimony, the following question and answer was asked and given:

Q. And at the time you arrived there, other than the deceased, was there anyone else connected with R.J.'s Food Center there that you observed?

A. Okay. After getting the information from some of the witnesses that were working across the street, the family came, his wife and she was about seven or eight months pregnant and his mother and father—

The answer was not responsive to the question. Appellant's attorney objected on the ground that the wife's pregnancy unknown to the appellant prior to the homicide, had no relevancy to the aggravating circumstances and was prejudicial to the defendant. The trial judge sustained the objection in chambers, and asked appellant's attorney, if he desired him to instruct the jury to disregard the statement. The attorney argued for a mistrial, which was denied, and then told the trial judge he had no alternative except to request the jury be instructed to disregard the statement.

[8, 9] Each juror said that he (she) would disregard the statement. The jury is presumed to have followed the directions of the judge. There was no error under *Hughes v. State*, 376 So.2d 1349 (Miss.1979); *Gray v. State*, 375 So.2d 994 (Miss.1979); and *Duke v. State*, 340 So.2d 727 (Miss. 1976).

Further, the court instructed the jury in Instruction No. 1 to "disregard all evidence which was excluded by the court from consideration during the course of the trial."

V.

Did the lower court err in permitting a witness to testify that the appellant said he killed the victim because he was "cold hearted?"

[10] Alfonso Artis, the accomplice, testified that he asked appellant why he shot Mr. Pahwa, and appellant replied, "I was cold hearted." Appellant testified on the trial that "I didn't mean to do it and I'm sorry." The statement he made to Artis soon after the homicide was relevant on the issue of aggravating circumstances.

In *Washington v. State*, 361 So.2d 61 (Miss.1978), the facts were similar to those here. There, the defendant struck the victim over the head with a shotgun, had obtained the money and was backing out of the store when he shot the victim in the stomach with the shotgun. The testimony here shows that, as in *Washington*, he could have fled without cold-heartedly killing the proprietor of the store.

VI.

Did the lower court err in permitting the prosecution to cross-examine the defendant's mother about his prior juvenile record?

During the defense's direct questioning of appellant's mother, Mary Lewis, the following occurred:

Q. Why did he not finish the tenth grade?

A. Well, Connie, he stopped to look for work and he would get odd jobs, you know, in order to help me and he would cut yards or whatever he could find to do and he would bring me most of the money. Sometimes he would give it all to me. And he was real good about helping me. *I never had no trouble out of him and when I had surgery, he stayed with me all the time.* He cooked and waited on me and saw that I got my medicine. He was a good child and I don't know why he got into this. *I reckon because he was with the wrong person, 'cause I never had no trouble out of him before.* (Witness sobs). [Emphasis added].

[11, 12] The State cross-examined Mrs. Lewis on that response, and she reiterated the appellant had been into different little

things a good while ago. The prosecuting attorney asked what little things she was talking about that he had been involved in, and she said he had gotten into something and he was released to his parents three or four times. She was interrogated in detail about those several times, but nothing was indicated as to what the matters involved or how they were disposed of in the Youth Court. Appellant contends that the Youth Court Act prohibits use of an adjudication of the Youth Court for impeachment purposes in any court. The contention is correct, except that the right of a defendant or prosecutor in criminal proceedings is preserved to show bias or interest. Here, no reference was made to Youth Court proceedings or action, and no attempt was made to introduce any adjudication order. Also, the questions asked were proper to test the recollection of the witness and was in rebuttal. *Allison v. State*, 274 So.2d 678 (Miss.1973); *Kearney v. State*, 68 Miss. 233, 8 So. 292 (1890).

VII.

Did the lower court err in failing to rule on the admissibility of appellant's letter to Alfonso Artis in a proper and timely fashion?

While appellant and Artis were incarcerated before trial, appellant wrote Artis that, if he (Artis) continued to cooperate with the police, appellant would "do to you the same thing I did to that man in the store . . . ."

During cross-examination of appellant's mother, the State introduced the letter as a handwriting specimen. It was marked for identification but not admitted into evidence. After Mrs. Lewis completed her testimony, the appellant moved to suppress the letter, or, that the trial judge rule on its admissibility, if it were offered in evidence later during the trial. The judge declined to make an advance ruling. Appellant testified and, on cross-examination, the State confronted him with the letter and the trial court admitted it in evidence.

[13] We do not think the judge was required to make an advance ruling and that such refusal was not error.

VIII.

Did the lower court err in refusing Jury Instructions D–3, D–4 and D–8?

Instruction D–3 follows:

I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

Instruction 7 (S–1) granted by the court instructed the jury that it must find the existence of certain statutory aggravating circumstances beyond a reasonable doubt prior to any consideration of the death penalty. It further limited the statutory aggravating circumstances to those four (4) on which evidence had been adduced during the trial.

Instruction D–4:

The Court instructs the Jury that the terms heinous, atrocious, and cruel are deemed to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies in that it involved the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence that the victim died a quick death without unnecessary pain and torture, then, though the crime is murder, it is not to be considered as especially heinous, atrocious or cruel.

[14] In our opinion, under the facts of the case sub judice and under the Mississippi statute, Instruction D–4 was too restrictive and its refusal does not constitute reversible error notwithstanding *Godfrey v. Georgia*. Further, the discussion under Part III hereinabove applies on this question.

Instruction D–8:

The Court instructs the Jury that even if you find that aggravating circumstances outweigh the mitigating circumstances, you may still recommend mercy and sentence the Defendant to life imprisonment.

The sense of that instruction was submitted in Instructions D–1 and D–7.

Instruction D–1

. . . . . .

You are instructed that even if you find the existence of one, two, three or more aggravating circumstances, you still can conclude that the circumstances are insufficient to warrant death, and you may impose a sentence of life imprisonment.

Instruction D–7

The Court instructs the Jury that you are not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial Court, but you must find a statutory aggravating circumstance before recommending a sentence of death.

IX.

Did the lower court correctly grant State's Instruction No. 7 (S–1)?

The mentioned instruction sets out the four statutory aggravating circumstances relied upon by the State. Appellant claims that the evidence did not show the homicide to be heinous, atrocious and cruel, nor did it properly establish that he was under sentence of imprisonment at the time the crime was committed.

These questions have been previously discussed hereinabove and lack merit.

X.

Did the lower court err in overruling objections to parts of the closing argument of the prosecution?

In the defense attorney's argument, Honorable James Bell made the following statement:

Keep in mind this. That there is a co-defendant here who received what amounts to a five-year sentence and ask yourself is it fair if the man wasn't holding the gun. He said that they talked about killing the man the day before. Ask yourself is it fair for him to get five years and Connie Ray Evans get death.

The district attorney, in answer, made the following statement: "You can sentence the defendant to life imprisonment but that's your sentence . . . that's just your sentence, ..."

[15] The appellant argues that the statement by the district attorney was an insinuation that, if the jury fixed the sentence at life, appellant would not serve life in the penitentiary. In our opinion, the argument of the district attorney may be interpreted in whatever manner the hearer wishes to interpret same. It does not say what appellant's counsel interprets it to say. If the argument was improper, then it could be said that the appellant's attorney provoked the comment in response to his argument.

We are of the opinion that the district attorney's statement does not constitute prejudicial or reversible error.

APPELLATE REVIEW OF SENTENCE

In accordance with Section 99–19–105(3)(a), (b), (c) . . (5), and the decisions of this Court and the Federal courts on imposition of the death penalty, we have carefully reviewed the record in this case and have compared it and the death sentence imposed in the cases which have been decided by this Court since *Jackson v. State*, 337 So.2d 1242 (Miss.1976). Those cases consist of fourteen (14) decisions by this Court from *Bell v. State*, 360 So.2d 1206 (Miss.1978), to *King v. State*, 421 So.2d 1009, No. 53,027, decided October 27, 1982, in which the death penalty was upheld.[4] In *Coleman v. State*, 378 So.2d 640 (Miss. 1979) the case was reversed as to punish-

4. A list of the cases is attached as Appendix A in *King v. State*.

ment and remanded for resentencing to life imprisonment.

[16] In our opinion, after such review and comparison, the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other and the death penalty will not be wantonly or freakishly imposed here.

[17] We also find and conclude that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor. The evidence in the case overwhelmingly supports the jury's finding of at least one statutory aggravating circumstance, viz: (1) the capital offense was committed by appellant while under sentence of imprisonment; (2) the capital offense was committed while the defendant was engaged in committing a robbery, (3) the capital offense was committed for the purpose of avoiding a lawful arrest, and (4) the capital offense was especially heinous, atrocious or cruel.

[18] After comparison of the present case to those enumerated herein, we find that the sentence of death is not excessive or disproportionate to the penalty imposed in those cases, considering both the crime and the manner in which it was committed and the defendant. We also are of the opinion that the death penalty imposed on Evans is consistent and even-handed to like and similar cases and the sentencing phase followed in this trial provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not imposed.[8]

The judgment of the lower court is affirmed, and Wednesday, December 1, 1982, is set for the date of execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AND WEDNESDAY, DECEMBER 1, 1982, SET FOR EXECUTION OF THE DEATH PENALTY.

PATTERSON, C.J., SUGG and WALKER, P.JJ., and BROOM, BOWLING, HAWKINS, DAN M. LEE and PRATHER, JJ., concur.

8. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Everin C. NEAL, Jr.

v.

STATE of Mississippi.

No. 53909.

Supreme Court of Mississippi.

Nov. 24, 1982.

Indigent prisoner filed petition which sought a writ of error coram nobis. The Circuit Court, Clarke County, Henry Palmer, J., denied petition, and the prisoner appealed. The Supreme Court, Prather, J., held that indigent prisoner seeking postconviction relief was not entitled to appointed counsel.

Affirmed.

1. **Constitutional Law** ⇐271
Criminal Law ⇐1077.3

Sixth and Fourteenth Amendments' right of counsel to an accused no longer applies after conviction upon appeal. U.S.C.A. Const.Amends. 6, 14.

2. **Constitutional Law** ⇐250.2(2)

Equal protection clause does not require the appointment of counsel in any discretionary or collateral proceedings. U.S.C.A. Const.Amend. 14.

3. **Criminal Law** ⇐998(20)

Indigent prisoner seeking postconviction relief, who had been afforded adequate legal assistance by the Department of Corrections, was not entitled to appointment of counsel.

83-6213

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONNIE RAY EVANS,	:
Petitioner,	:
v.	:
THE STATE OF MISSISSIPPI,	:
Respondent.	:

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Connie Ray Evans, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Mississippi without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Mississippi State Penitentiary, Parchman, Mississippi. Mr. Evans's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

STEVEN L. WINTER
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

ATTORNEY FOR PETITIONER

83-6213

IN THE
SUPREME COURT OF THE UNITED STATES

CONNIE RAY EVANS — PETITIONER

V. — NO. A-630

THE STATE OF MISSISSIPPI — RESPONDENT

AFFIDAVIT IN SUPPORT OF REQUEST
TO PROCEED IN FORMA PAUPERIS

STATE OF MISSISSIPPI)
ss:
COUNTY OF SUNFLOWER)

I, Connie Ray Evans, being duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding to to give security therefor and that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes___ No X
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   1979 wages were $335-

   b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

   1979 wages were $335-

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business profession or form of self-employment? Yes___ No X
   b. Rent payments, interest or dividends? Yes___ No X
   c. Pensions, annuities or life insurance payments? Yes___ No X
   d. Gifts or inheritances? Yes___ No X
   e. Any other sources? Yes___ No X

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. ___

3. Do you own cash, or do you have money in checking or savings account?

Yes____ No X (Include any funds in prison accounts.) If the answer is "yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes____ No X
If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Connie Ray Evans.
CONNIE RAY EVANS

Sworn to and subscribed before me this 9 day of May, 1984.

Judith L. Porter
NOTARY PUBLIC

My Commission expires: My Commission Expires Jan. 23, 1985

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $\$-0-$ on account to his credit at the Mississippi State Penitentiary at Parchman, the institution where he is confined. I further certify that Petitioner likewise has the following securities: ~~none~~ to his credit according to the records of said Mississippi State Penitentiary at Parchman.

Cashier Inmate Prisoners' Fund
AUTHORIZED OFFICER OF INSTITUTION
5/9/84
Connie Ray Evans No #

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONNIE RAY EVANS, :

Petitioner, :

v.

THE STATE OF MISSISSIPPI, :

Respondent. :

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

STEVEN L. WINTER, being duly sworn, states:

1. I am an attorney for Connie Ray Evans, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Evans's motion for leave to proceed in forma pauperis. My representation of Mr. Evans is without remuneration.

2. Mr. Evans is presently in the custody of the State of Mississippi and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Evans by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Evans is attached hereto.

3. Counsel was appointed to represent Mr. Evans at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Evans is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Evans is entitled to redress in this action.

STEVEN L. WINTER

Sworn to before me this

3rd day of February, 1984.

NOTARY PUBLIC

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONNIE RAY EVANS,	:
Petitioner,	:
v.	:
THE STATE OF MISSISSIPPI,	:
Respondent.	:

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

STATE OF MISSISSIPPI)
ss:
COUNTY OF SUNFLOWER)

I, Connie Ray Evans, being duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor and that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes___ No___
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

_____

_____

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes___ No___

b. Rent payments, interest or dividends? Yes___ No___

c. Pensions, annuities or life insurance payments? Yes___ No___

d. Gifts or inheritances? Yes___ No___

e. Any other sources? Yes___ No___

If the answer to any of the aboe is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

_____

_____

_____

_____

3. Do you own cash, or do you have money in checking or savings acocunt?

Yes___ No___ (Include any funds in prison accounts.) If the answer is "yes," state the total value of the items owned.

_____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes___ No___

If the answer is "yes," describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

_____

_____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____
CONNIE RAY EVANS

Sworn to and subscribed before me this

____ day of _____, 1984

_____
NOTARY PUBLIC

Certificate

I hereby certify that the petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

_____
Authorized Officer of
Institution